

**ACCOUNTING FOR THE TRUE COST OF  
REGULATION: EXPLORING THE POSSIBILITY OF  
A REGULATORY BUDGET**

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**JOINT HEARING**

BEFORE THE

**COMMITTEE ON THE BUDGET**

AND THE

**COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

**ONE HUNDRED FOURTEENTH CONGRESS**

**FIRST SESSION**

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# ACCOUNTING FOR THE TRUE COST OF REGULATION: EXPLORING THE POSSIBILITY OF A REGULATORY BUDGET

TUESDAY, JUNE 23, 2015

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committees met, pursuant to notice, at 10:06 a.m., in room SD-G50, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Enzi, Grassley, Portman, Ayotte, Lankford, Perdue, Ernst, Carper, Stabenow, Whitehouse, Warner, King, Heitkamp, and Peters.

## OPENING STATEMENT OF CHAIRMAN JOHNSON

Chairman JOHNSON. Good morning. This hearing will come to order.

I want to welcome the witnesses. Thank you for your written testimony. I am looking forward to this hearing on really how do we come to grips with our regulatory burden in terms of some kind of regulatory budget, some kind of process for subtraction.

Certainly one thing I have learned in my 4½ years here in Washington, D.C., is everything seems to be additive. And, of course, we have over the decades added layer upon layer upon layer—I could keep going—of law and rules and regulations, which are becoming quite burdensome.

One of the things I am always trying to attempt to do is really grab America by the lapels so they understand the extent of this problem. And the problem with the regulations, unless you are on the front lines, unless you are a compliance officer in a business, unless you are an innovator, distracted from innovating and creating and building a business and creating jobs, distracted by the fact that you have to comply with layer upon layer of Federal and State regulations, you really do not understand really how corrosive and harmful all of this regulatory overreach has become in terms of growing the economy, allowing businesses that create products and services that we all actually do value, and as a result growing a business to create the kind of good jobs that we all are seeking for the American public.

A couple ways I try and quantify it is we have had a number of studies that try and calculate what the cost of the regulatory burden is. We have had some estimates as high as \$2 trillion. Well,

again, we are immune to these enormous numbers, so let me put that in perspective for folks.

Only nine economies in the world are larger than \$2 trillion. Whether you completely buy into that figure, it gives you some measure of the depth, the size of the problem, the onerous nature of the regulatory burden.

Another way of looking at this is, if you remember, in 2009 during the debate over the health care law, I know that a lot of people are really concerned about the fact that we are spending one-sixth of our economy on health care—again, trying to heal ourselves, get well, cure diseases. That one-sixth of our economy is about \$2.5 trillion. So, there is a lot of time and effort put into trying to contain and control \$2.5 trillion worth of expenditure on health care. Where is the outrage, where is the sense of urgency to try and control a \$2 trillion regulatory burden?

Another way of kind of putting this in perspective is understanding how we create all these regulations. We do not seem to pass laws anymore in this Congress. What we do is we pass frameworks. Two examples: Both Dodd-Frank and Obamacare were somewhere between 350,000 and 380,000 words when they were enacted. This is about a year ago when I had my staff check into this. About a year ago, Dodd-Frank was already up to 15 million words, about 43 times the size of the original legislation. Obamacare was over 12 million words, about 32 times the size.

So, again, I am just trying to put into context the extent of this regulatory burden because, again, unless you are one of those business owners or a compliance officer having to deal with complying with regulations, being distracted from your primary goal of growing a business, growing your organization, providing products and services we all want, we really do not understand collectively what this burden really is.

So the purpose of this hearing is to lay out that reality and then start trying to grapple with some ways we can come up with a subtractive process as opposed to strictly additive. And we have a representative here from the Canadian Government that I think has come up with something that is certainly started, I think began in the United Kingdom (U.K.), a one-in/one-out rule. I mentioned that I would be all in favor of a one-in/ten-out rule, but I will be happy with incremental success. So we are looking forward to that kind of testimony.

I do ask consent that my written statement be entered in the record.<sup>1</sup>

With that, I will turn it over to our other Chairman, Senator Mike Enzi. This is a somewhat unusual hearing. We are combining our Senate Committee on Homeland Security and Governmental Affairs (HSGAC) together with the Budget Committee. Because these are sort of dual jurisdiction, we thought this was a pretty interesting hearing for all of our Members. Senator Enzi

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<sup>1</sup> The prepared statement of Senator Johnson appears in the Appendix on page 35.

### OPENING STATEMENT OF CHAIRMAN ENZI

Chairman ENZI. Thank you, Chairman Johnson, for hosting this hearing today, and, yes, I am told that it is historic. This is the first time that two committees have met together to do a topic on the same hearing at the same time in 20 years. So this saves us having to bring them in twice and do the same thing.

Chairman JOHNSON. High efficiency.

Chairman ENZI. Yes, which is what we are trying to get, more efficiency.

Welcome to Minister Clement. Mr. Clement, we appreciate you taking the time out of your busy schedule to visit with us and share your success in addressing the regulatory burden in the economy of Canada, and I was impressed that you serve on the Treasury Board of Canada.

Ms. Dudley and Mr. Pierce, welcome. We have kind of a common connection. You teach at the George Washington University (GWU). I went to the George Washington University.

Last month, for the first time since 2001, Congress agreed to a joint 10-year Federal budget that put our Nation on a path to a balanced budget. According to the Congressional Budget Office (CBO), a balanced budget will boost the Nation's economic growth and will provide for more than 1 million additional new jobs over the next 10 years.

The Budget Committee is now working to enforce the spending targets laid out in the budget to make sure we stay on that path. But we have no such accounting and enforcement system when it comes to the regulation side of the ledger. The absence of such a system for regulations is an increasingly odd deficiency. Why not also address an area of government that would have the biggest positive impact on the lives of hardworking Americans by making government less intrusive?

We heard from Senator Johnson a little bit on what the costs are. I am going to cover those again and in addition, because I wondered what it costs to have America's growing regulatory burden. The burden of government continues to grow for each and every American. One study estimated that the regulatory burden in the United States cost more than \$1,800 billion in 2014 alone. Now, that is \$1.8 trillion, but I prefer to call it "\$1,800 billion" because that sounds like a bigger number than one of anything. And that was bigger than the entire gross domestic product (GDP) of India. This burden is dragging down our economy when we should be working to boost economic growth and help create more jobs.

These regulations are particularly hurting small businesses, which traditionally are America's economic engine. Over the years, we have tried various reform mechanisms to control red tape. Dating back to the 1980s, the Executive Branch has tried to control the flow of government agency regulations through Executive Orders (EO) mandating regulatory impact assessments on major rules. Agencies are tasked with measuring the paperwork burden of legislation, and laws have been passed to assess the small business impact of legislation.

I strongly support these efforts, but if you ask the average small business owner in Wyoming if red tape has been reduced, he or she would absolutely shake their head and say no.

We have a lot of work to do because the regulations and the burden they place on each and every American keep growing. What can we do to help ease the regulatory burdens? Minister Clement, I am especially looking forward to hearing more about your successful Red Tape Reduction Plan in Canada. We have a regulatory accounting system in place here as part of the Office of Management and Budget (OMB) which is supposed to regularly report on the cost of major regulations. However, that report does not encompass the whole government, and it is not built into any type of regulatory measure reduction system. It is almost like watching a fire slowly burn down a house without calling the fire department.

In particular, I am interested in how the one-for-one rule requires regulators to monetize and offset any increases in administrative burden that result from regulatory changes with equal reductions from existing regulations. I am excited about today's hearing in part because we are going to hear a fresh perspective from those who have waged successful campaigns against red tape. Under Mr. Clement's leadership, when it comes to lowering regulatory burdens, Canada has experienced annual estimated compliance savings of 290,000 hours. That is equal to more than 33 years. That is the time that individuals can use to grow their businesses or improve their work.

This Congress has a number of measures pending that would address regulations. However, we need to explore better ways to actually measure their costs in order to find more effective controls and procedures for eliminating unneeded and redundant regulations.

Can we make government more effective? We know that one of the best ways to balance our budget is to make our government more efficient and accountable. Scrutinizing the rules and regulations that are hurting hardworking Americans helps us do both. If we can do this, we start to see what is not working and eliminate those regulations while streamlining what is left to help make government more effective. If government regulations are not delivering results, they should be improved. And if they are not needed, they ought to be eliminated.

It is time to prioritize and demand results to ensure that government works for the people instead of the people working for the government. Congress has a responsibility to help make it easier for hardworking Americans to grow their businesses or advance in their jobs instead of worrying about inefficient and ineffective regulations.

True regulatory reform can help serve as a foundation for helping all Americans grow and prosper. There are many different options. That is why I look forward to this conversation, beginning with our work here today.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Chairman Enzi.

Senator Carper.



### OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thank you, Mr. Chairman. Both Mr. Chairmen, thank you both. And to our colleagues from the Budget Committee, great to be with all of you.

Our friends from Canada, bienvenue. We are happy to see you. Thanks for joining us.

And, Susan, wonderful to see you again. I have great memories of when you were part of the Bush Administration and wore the Office of Information and Regulatory Affairs (OIRA) hat, and it is great to see you again. Thank you for all your service to our country.

And, Mr. Pierce, I am excited about your testimony and am looking forward to hearing about your points about it is important for us not to ignore the benefits that may flow from regulations as we look at the costs.

But we are happy you are all here, and my colleagues have heard me say this more than they would want to admit, but I often say people who have our jobs, we do not create jobs. Mayors do not create jobs. Governors do not create jobs. Presidents do not create jobs. What we do is try to create a nurturing environment for job creation. And that consists of a lot of different things: access to capital; a world-class workforce; rule of law and public safety; robust, vibrant transportation systems; a predictable Tax Code; a bearable tax burden; and also common-sense regulations.

Two days after Father's Day, I am channeling my Dad, now deceased, but he used to say to my sister and me when we were growing up—and you can probably remember stuff that your parents said to you when you were growing up. My Dad would say to my sister—and when we would do some bone-headed stunt. He was always saying, “Just use some common sense.” He said it a lot. He did not say it that nicely. And one of the things I took away from that was to use some common sense.

I think part of the nurturing environment for job creation and job preservation is, frankly, if we are going to have regulations—and we need them—make sure we are using some common sense.

Regulations can help consumers feel confident that the products they buy and use every day are safe. Thoughtful regulations provide businesses with the predictability that they need. They play a major role in our daily lives, and usually—not always, but usually in positive ways. Every time we go to the bank, every time we drive a car or take a breath of clean air or a drink of clean water, we are enjoying the benefits of regulations.

Of course, the regulatory process can be cumbersome at times. We all know that by personal experience. Not infrequently, regulations do impose some additional costs and requirements on businesses and on others who must comply with them. But I disagree with those who think that we have to choose between regulation and having a robust, growing economy. I think we can have both, and the record would show even now, as we make changes in some of our regulations, we have been able to grow the economy finally pretty smartly.

For example, common-sense, cost-effective regulations to address our Nation's environmental and our energy challenges help to reduce harmful pollutants and lower energy costs. They also help the

economy by putting Americans to work in advanced manufacturing jobs to create new products.

I like to say that many of the laws that we pass in Congress are kind of like a skeleton. The regulatory process sort of puts the meat on the bones in order to have a fully prepared body. But Congress cannot always include in legislation the minute details, so we must ensure that the regulatory process results in regulations that achieve the objectives laid out in the laws that we pass here. To that end, it is important that we conduct oversight of the regulatory process to try to reduce burdens and encourage transparency.

As we work to reduce the burdens, however, let us not forget about the benefits that flow—and Mr. Pierce will make this point later on—the benefits that flow from most regulations. I worry that is the fatal flaw in many discussions of a “regulatory budget” or “regulatory PAYGO” that is the subject of today’s hearing. Such a system does not account for the benefits that regulations can and oftentimes do provide.

Excluding the benefits from the equation may lead to the repeal of a rule and a reduction in the burden it places on businesses. But doing so potentially ignores the much greater benefits, economic and otherwise, that rule could bring to society as a whole. And that would be a mistake.

So I want to be honest with everybody, I have some concerns with the idea that an agency’s ability to implement a new rule could depend on it repealing an older one first in order to meet its “regulatory budget,” when, in fact, the older regulation actually might still be necessary. Or maybe even worse, an agency may delay implementing a much needed rule because an offset cannot be found.

For example, the Environmental Protection Agency (EPA) could be forced to choose between issuing the proposed Clean Power Plan rule to regulate carbon pollution or keeping the Mercury and Air Toxics rule to regulate mercury emissions. It does not make sense, at least not to me, to make the EPA choose which air pollutants to regulate to protect public health just to fit the restrictions of a regulatory budget.

That said, though, I am a strong supporter of efforts to identify existing regulations that should be modified or repealed. I have been encouraged by the administration’s work in this arena and by the personal commitment the President has shown to these efforts to conduct retrospective reviews.

Let me close by saying this: Cass Sunstein—and, Ms. Dudley, I am not sure if Cass actually succeeded you or not in your post, but I think he did. Cass was asked by this President, the current President, to do a top-to-bottom review of all of our regulations, find out which ones still make sense, which ones should be changed, and which ones we ought to get rid of. And I think that kind of top-to-bottom review, not just at the beginning of an administration but throughout an administration, actually makes a whole lot of sense, too.

Thanks, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Carper.

It is the tradition of this Committee to swear in witnesses, so if you will all stand and raise your right hand. Do you swear the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. CLEMENT. I do.

Ms. DUDLEY. I do.

Mr. PIERCE. I do.

Chairman JOHNSON. Please be seated.

Our first witness is the Honorable Tony Clement. Minister Clement is the president of the Treasury Board of Canada. Since 2006, he has served as the Member of Parliament for the Ontario Riding of Parry Sound-Muskoka. In the House of Commons, Minister Clement has served on the front benches as both Minister of Health and Minister of Industry. In this capacity, Minister Clement heads the development and implementation of a cross-government review looking at transformational ways to support and deliver services to taxpayers in the most efficient and effective means possible. During his private sector career, Mr. Clement was a lawyer, business board member, and a small business owner and entrepreneur. Minister Clement.

**TESTIMONY OF THE HONORABLE TONY CLEMENT,<sup>1</sup> PRESIDENT OF THE TREASURY BOARD, GOVERNMENT OF CANADA**

Mr. CLEMENT. Well, thank you very much, Chairman Johnson, Chairman Enzi, Ranking Members, and distinguished Members of this set of committees. Thank you so much for inviting me here today to be in Washington, D.C. It is such an honor to address a common issue of concern for both our countries—namely, the reduction of excessive Federal regulatory burden on our countries.

As you mentioned, Senator, my primary job was to do spending reviews, never the most popular man on the Hill when you are reducing budgets, but we were able to balance the Canadian Federal budget this year and actually have a small surplus, and that was a primary function of the Treasury. But I also had this other important function, which was to review our regulatory burden, particularly as it pertained to small business. And it is in that capacity that I worked through our Red Tape Reduction Action Plan, which culminated in a bill which passed Parliament just this past April, which dealt primarily with this one-for-one policy, making it not only just a policy of government but actually the law of the land. And that is making it one of the first pieces of legislation on one-for-one, as we call it, in the world of its kind.

I wanted to quote the executive vice president of the Canadian Federation of Independent Business, Laura Jones, who said, and I quote: “The effort to control red tape got a big boost . . . when C-21”—that was the one-for-one law—“became law. The stick-to-itiveness from the Prime Minister, Minister Clement and colleagues with respect to implementing the Red Tape Action Plan on behalf of small business deserves applause from all Canadians as it is critical to our economic well-being going forward.” So that is how small business saw this.

The one-for-one law has two key parts:

<sup>1</sup> The prepared statement of Mr. Clement appears in the Appendix on page 46.

First, it requires that regulatory changes which increase administrative burden costs be offset with equal reductions in administrative burden.

Second, ministers of the Federal Government departments are required to remove at least one regulation each time they introduce a new one that imposes administrative burden costs on business.

We, as I said, introduced this as a policy of government 3 years ago. Over the first 2 years of the policy, we saw hard evidence that the rule was reducing the administrative burden on business.

As of May 20 of this year, in fact, the rule has saved businesses about \$32 million in administrative burden, and actually the hourly count now, Senator, is almost 750,000 person-hours annually or nearly 85 years, reduced in time spent by businesses dealing with regulatory red tape. So those are encouraging results, and that is why we decided to enshrine the reduction of red tape in law.

I also want to mention that this was also part of a cultural shift that we wanted to take place within our Federal regulatory system. We wanted to make sure that it was part of the culture of the place in Parliament, in our government, to look at how any regulation was impacting on society more generally, but particularly on small business. And that is what you do when you create a basic inventory of baseline regulatory requirements and Federal regulations, and then start to monetize the administrative burden on business.

So we do have an administrative burden count, and that contributes to accountability and openness in the Federal regulatory system. And then we use what is called the “standard cost model,” where we calculate the administrative burden of these regulations under the one-for-one law. The standard cost model formula—and it is a formula—involves multiplying the wages times the hours times the number of businesses that are impacted by a proposed regulation to give an estimated cost of the burden of an administrative requirement on business. And that is an internationally accepted way to estimate the administrative burden costs to businesses resulting from information and reporting obligations including in the regulation.

Further, to the counting and costing of Federal regulations, the Government of Canada committed to publicly report this information every year as part of efforts to maintain transparency in monitoring and reporting. And so by the end of 2014, the government had a calculated total of 129,860 Federal requirements and regulations and related forms that could impact Canadian businesses across different sectors and industries.

So let me just in the time I have available talk about how the rule works in practice. I will give you one example: Health Canada, which has reduced red tape burden by amending regulations to allow regulated pharmacy technicians to oversee the transfer of prescriptions from one pharmacy to another, a task that was previously restricted by regulation to the actual pharmacist. This enables pharmacists to spend more time providing advice to and serving customers while running their businesses. And just reducing that burden alone saved pharmacists \$15 million a year.

So this underscores the importance of reducing red tape for the small businesses, and, of course, those are the backbones of both of our economies.

Just a little bit on process. We carried out extensive consultations starting in January 2011. Prime Minister Harper launched the Red Tape Reduction Commission. We held roundtables with businesses and business groups in 13 cities across Canada. We had 2,300 submissions. And that is where we came up with these ideas, including the one-for-one rule.

I do not have to tell you that business owners felt regulators do not understand what entrepreneurs had to do to succeed and were actually making it harder for them to do so. And so we set out to reduce the burden on them.

I think there is a lot of lessons for other countries, including the United States of America, and we certainly look forward to working with you on the Regulatory Cooperation Council, which is certainly a bi-national body where we can, in fact, impact change there as well.

Thank you very much.

Chairman JOHNSON. Thank you, Minister Clement.

Our next witness is the Honorable Susan Dudley. Ms. Dudley is the Director of the George Washington University Regulatory Studies Center, which she established in 2009. From April 2007 through January 2009, Professor Dudley served as the Presidentially appointed Administrator of the Office of Information and Regulatory Affairs, in the U.S. Office of Management and Budget. Prior to being the Administrator for OIRA, she directed the Regulatory Studies Program at the Mercatus Center at George Mason University and taught courses on regulation at the George Mason University School of Law. Professor Dudley.

**TESTIMONY OF THE HONORABLE SUSAN E. DUDLEY,<sup>1</sup> DIRECTOR, REGULATORY STUDIES CENTER, AND DISTINGUISHED PROFESSOR OF PRACTICE, THE GEORGE WASHINGTON UNIVERSITY**

Ms. DUDLEY. Thank you very much, Chairman Johnson, Chairman Enzi, and distinguished Members of the Committee. I am very happy to be joining you today, and I appreciate the Committee's interest in exploring the possibility of a regulatory budget.

Like the spending programs embodied in the fiscal budget and supported by taxes, regulations provide benefits to Americans. But the costs associated with regulatory programs are not as transparent nor are they subject to the same checks and balances. As a result, it is often more politically desirable to accomplish policy objectives through regulatory tools rather than more direct spending tools. Not only are regulatory costs less visible, but they are often assumed to be borne by businesses even though individual consumers and workers ultimately shoulder them.

In the United States, the development of individual regulations is constrained in three ways: by their enabling legislation, the notice and comment procedures of the Administrative Procedure Act (APA), and by executive requirements for benefit-cost analysis. Despite this, the scope and reach of regulations continue to grow, and with it concerns that we may be reaching a point of diminishing returns. The application of fiscal budgeting concepts to regulation

<sup>1</sup> The prepared statement of Ms. Dudley appears in the Appendix on page 53.

holds the potential to bring more accountability and transparency to the regulatory process.

The idea is not new. In 1980, President Carter's Economic Report of the President discussed proposals to—and I am quoting now—“develop a ‘regulatory budget,’ similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits.” So my written testimony summarizes some advantages of a regulatory budget and also some challenges, and I will just summarize those briefly.

An advantage of a regulatory budget would be increased transparency regarding the private sector resources needed to achieve regulatory objectives. I think this is something that Mr. Clement mentioned in Canada, and it helps inform regulatory priorities and tradeoffs. This transparency would also strengthen political accountability and discipline. Expected benefits would be considered up front (when issuing new legislation or new regulations), at which point elected officials would consider how much achieving particular goals are worth.

Resources would likely be better allocated because policymakers would have incentives to find the most cost-effective ways of achieving goals.

A regulatory budget could impose internal discipline on regulatory agencies, perhaps lessening the need for case-by-case oversight. By allowing agencies to set priorities and make tradeoffs among regulatory programs, subject to a defined constraint, it might remove some of the contentiousness surrounding benefit-cost analysis and Presidential oversight.

And, finally, a regulatory budget constraint would also encourage evaluation of existing rules' costs and effects, and both of you Chairmen mentioned that in your opening remarks. Despite broad support, initiatives to require ex post evaluation of regulations have met with limited success largely because they did not change the underlying incentives. If the issuance of new regulations were contingent on finding a regulatory offset, agencies would have incentives to evaluate how well existing programs are working.

Now, despite these potential advantages, a regulatory budget would be challenging analytically. The task of gathering and analyzing information on the costs of all existing regulations in order to establish a baseline budget would be enormous and the resulting numbers probably not very reliable. Even defining what should be considered “costs” would be challenging. Estimating the opportunity costs of regulation is not as straightforward as estimating the fiscal budget outlays, where past outlays are known and we can predict future outlays with some accuracy.

So an incremental approach, such as a “regulatory PAYGO” or a one-for-one approach, would avoid some of these difficulties while retaining many of the benefits of a regulatory budget. Under such an approach, agencies would have to eliminate an outdated or duplicative regulation before issuing a new regulation of the same approximate impact. Unlike a regulatory budget, agencies would only have to estimate costs for regulations being introduced—which they should do anyway—and for offsetting regulations they would like to remove. Nevertheless, deciding what costs should be included in

estimating budgets or offsets will necessarily be a matter of judgment.

These problems are not insurmountable, as we can see from the experience in Canada and the United Kingdom and other countries that have addressed these issues and initiated successful reforms using regulatory offsets.

While it will never be possible to estimate the real social costs of regulations with any precision, these approaches should provide incentives to improve our understanding of regulatory impacts—as Mr. Clement said, change the culture.

A regulatory budget or a more modest regulatory PAYGO has the potential to impose discipline on regulatory agencies, generate a constructive debate on the real impacts of regulation, and ultimately lead to a more cost-effective achievement of policy priorities.

So I will close with a quote from President Carter's 1980 Economic Report: "The Nation must recognize that regulation to meet social goals competes for scarce resources with other national objectives. Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached."

So given the increase in regulatory activity in the 35 years since those words were written, I appreciate the Committee's interest in exploring a budget now. Thank you.

Chairman JOHNSON. Thank you, Professor Dudley.

Our next witness is Professor Richard Pierce, Jr. Professor Pierce is the Lyle T. Alverson Professor of Law at George Washington University. He has taught and researched in the fields of administrative law and regulatory practice for 38 years. He has published 125 scholarly articles and 20 books in those fields. His books and articles have been cited in hundreds of agency and court opinions, including over a dozen opinions of the U.S. Supreme Court. He is a member of the Administrative Conference of the United States. Professor Pierce.

**TESTIMONY OF RICHARD J. PIERCE, JR.,<sup>1</sup> LYLE T. ALVERSON  
PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY  
SCHOOL OF LAW**

Mr. PIERCE. I want to begin by thanking Chairmen Johnson and Enzi and Ranking Members Carper and Sanders, and the other distinguished Members of the Senate Committees on the Budget and on Homeland Security and Governmental Affairs for giving me the opportunity to testify today on possibility of a regulatory budget.

I strongly support the idea of a regulatory budget, but it needs to be very carefully designed and implemented. As I will explain in a couple of minutes, we already have the functional equivalent of a regulatory budget that is well designed and well implemented. Indeed, it was implemented by Professor Dudley for 2 years recently during the Bush Administration.

<sup>1</sup>The prepared statement of Mr. Pierce appears in the Appendix on page 65.

Now, there are versions of a regulatory budget that would harm the Nation. Any version that is based solely on the cost of a rule and ignores the benefits of a rule would harm the Nation. I share the views that President Reagan expressed when he issued Executive Order 12291. That Executive Order required each agency to use benefit-cost analysis to evaluate each rule the agency proposes to issue and to issue only those rules that will yield estimated benefits that exceed the estimated costs of the rule. President Reagan's Executive Order also gave the Office of Information and Regulatory Affairs, responsibility to review the benefit-cost analysis provided by each agency of each rule and to take such actions as are needed to ensure that each agency complies with that Executive Order.

Every President since President Reagan has issued Executive Orders that reflect President Reagan's view that the cost of a rule alone is not an appropriate criterion to use in deciding whether the agency should issue the rule, and that the appropriate criterion is the net benefits of a rule to society. Those net benefits can only be estimated by subtracting the estimated cost of a rule from the estimated benefits of the rule. The benefits often include lives saved, injuries and illnesses avoided, and reductions in property damage.

The importance of considering both the benefits and the cost of a proposed rule is illustrated particularly well by OIRA's most recent estimates of the aggregate costs and benefits of all of the rules reviewed by OIRA during the last 10 years. As you know, OIRA is required to provide that report to the House and Senate annually.

In the most recent such report, OIRA estimated that the costs of the rules that it had reviewed over the last 10 years were between \$57 and \$84 billion. That seems like a very large regulatory cost until you compare it with OIRA's estimate of the benefits of those rules. OIRA estimated the aggregate benefits as between \$217 billion and \$863 billion. So OIRA's estimates indicate that over that 10-year period of time, the aggregate benefits exceeded the aggregate costs by a factor of 3 to 15 to 1.

More recently, Presidents Clinton, Bush, and Obama have reinforced the principles underlying benefit-cost analysis by issuing Executive Orders that require agencies to review all of their existing rules, to identify those rules that impose costs that exceed the benefits they confer on society, and to begin the process of rescinding any rule that produces costs that exceed its benefits. Those Executive Orders are an excellent complement to the Executive Orders that forbid an agency from issuing a new rule unless its benefits exceed its costs. Those Executive Orders are estimated to provide cost savings of \$20 billion and 100 million hours of paperwork.

When you combine the effects of the Executive Orders that forbid an agency from issuing a rule with costs that exceed its benefits with the effects of the Executive Orders that require agencies to identify and to rescind any existing rule with costs that exceed its benefits, you get a regulatory budget that maximizes the net benefits created by rules issued by Federal agencies by ensuring that the aggregate benefits of those rules exceed the aggregate costs of those rules. That is a sensible version of a regulatory budget that every year improves social welfare to the United States.

I should add one other thing. This hearing is particularly timely. I expect that either today or tomorrow the U.S. Supreme Court is



going to decide a case involving how to calculate costs and benefits,<sup>1</sup> and I am going to be very interested, as I am sure Professor Dudley will, in how the Court addresses that issue.

I want to thank you again for the opportunity to testify today, and I look forward to your questions.

Chairman JOHNSON. Thank you, Professor Pierce.

I will start the round of questioning with a question for Minister Clement. Minister Clement, how difficult has it been—because we have heard a number of people talk about the potential dangers of just having to eliminate a regulation if you are going to implement a new one. How difficult has it been in Canada for you to identify regulations to eliminate?

Mr. CLEMENT. Not that difficult at all, Senator. Of course, by requiring each department and agency to basically do an audit of what they had in stock as regulations on the books, that gave them an idea about which regulations were still meaningful in the 21st Century. And so as president of the Treasury Board, what we do at the beginning of every meeting is we have a ledger—because we are basically the board that does approve new regulations as well as looking at expenditures of government, and so at the start of each board meeting, we will have a ledger, and if there is a department or agency that is proposing a new regulation, rather, they also have a period of time during which they can find an out for the in that they are putting in. And so they are given a period of time in which to do that. They do not have to do that immediately because there might be some immediacy to the regulation. But within a defined period of time, within a 24-month period, they have to find an out.

And so I keep a ledger of each regulatory department and agency, and so far there has been no issue. And, in fact, in some cases, in order to buildup some bandwidth for proposed new regulations that they are anticipating with their regulatory agenda, some departments and agencies remove regulations to create a credit for themselves, which they can then withdraw from at the appropriate time when they are creating new regulations.

Chairman JOHNSON. So this really has created a cultural shift, a real discipline to the process. I think you mentioned in your testimony 129,000 different regulations in Canada. Is there any assessment as a result of this culture shift, this discipline, that would indicate how many of those are going to be potentially on the chopping block? How many of those 129,000 might be eliminated? Do you have a feel for that?

Mr. CLEMENT. Well, we are not going to run out of time for those. This is going to be an ongoing exercise. And by culture shift—I am a politician as well. I have to get re-elected. And I have noticed—maybe this happens in other jurisdictions as well, but whenever there is an issue that comes to the fore, a media issue or what have

<sup>1</sup>Mr. Pierce referred to an important case involving-benefit-cost-analysis that the Supreme Court was about to decide. The Court decided that case on June 29, 2015, in *Michigan v. EPA*. A five justice majority held that the term “appropriate and necessary” in the Clean Air Act could not reasonably be interpreted to allow the agency not to consider costs in its decisionmaking. The majority held that EPA must consider cost in some way. It vacated the rule that was before the Court based on the majority’s conclusion that EPA has not considered cost at all. The four dissenting Justices agreed with the majority that it would be unreasonable for an agency to make a major decision without considering cost, but the dissenting Justices expressed the view that EPA had considered cost in making the decision before the Court.

you, people start to light their hair on fire and run around in circles in Ottawa and say, "What do we do? We have this issue." And the normal go-to position had always been, "Well, if we only pass this regulation, that issue will go away."

And what we have done is we have created a cost to that kind of thinking, because now they have to think about what regulations they want to remove from the books in order to pass that regulation, and there might be 15 other ways to solve the problem, the public policy problem that is exercising the minds of somebody or another, that do not involve regulating particularly on small businesses.

And so what we have done is created a discipline within the system by adding to the internal cost of thinking about regulation that shifts them to find other ways to resolve the public policy issue that does not involve overregulation of small business.

Chairman JOHNSON. So, again, in the past, everything in Canada, like in the United States, has been additive, and you have come up with a process for subtraction.

Mr. CLEMENT. Exactly right.

Chairman JOHNSON. What a concept.

Professor Dudley, you are certainly aware of the fact how challenging it is to calculate these costs benefits. In a perfect world, we would have perfect information on that. I am a little concerned in terms of how this administration has handled the calculation of benefits. In President Obama's Executive Order issued in 2011, his direction to OIRA, in terms of calculating the benefits, he included equity, human dignity, fairness, and distributive impacts. That seems to be a loophole in terms of calculating a benefit so you can drive a Mack truck through it. Can you just talk about the appropriateness of that type of loose language and how easy it becomes to certainly calculate benefits that far exceed costs?

Ms. DUDLEY. Yes. In an ideal world, we would have all the information on the consequences of a regulation before we issue it—so both the costs and the benefits. There will be equitable impacts on the cost side; there will be efficiency impacts. So all those impacts would affect either side of the ledger. In an ideal world, we would have all that information before we made the decision. We will never have that.

So I do have a concern that there is a greater emphasis on finding those indirect or other types of impacts on the benefit side of the ledger than on the cost side.

Chairman JOHNSON. Has anybody really set about doing a study in terms of the opportunity cost on people who are trying to innovate, trying to produce products and services just in terms of—again, in Canada, they are taking the number of hours times number of businesses times wage rates to come up with a cost or kind of a defined formula. But, again, it is very difficult. Has anybody estimated just the opportunity costs of regulations on our economy?

Ms. DUDLEY. There are some estimates, and I do not know how reliable they are. It is tricky to do. It is.

Chairman JOHNSON. Professor Pierce, again, you were obviously—and, again, I agree. Cost-benefit analysis is exactly what you need to go through, but, again, it is difficult to come up with exactly those numbers. Do you know how many rules and regula-

tions have actually been eliminated in the United States over the last 10 years?

Mr. PIERCE. No.

Chairman JOHNSON. Is that something, do you think, that the Federal Government ought to keep track of?

Mr. PIERCE. Yes. I do not know whether Professor Dudley's office takes on that responsibility or not.

Chairman JOHNSON. Professor Dudley.

Ms. DUDLEY. As I think you mentioned, Professor Pierce. We are friends. We have to be careful to treat each other respectfully here. Each administration of the last three Presidents has required agencies to look back and try to remove them. I think there is some tracking of that, but I do not know how accurate or robust it is.

Chairman JOHNSON. But, again, the fact of the matter is we have dramatically increased the number of rules, regulations, laws, but have not done a real good job of eliminating them, right? Once they are on the books, they just stick around there, and, it has been very difficult to remove them. Isn't that a basic fact? Professor Pierce.

Mr. PIERCE. I think there has been a net increase in the number of rules, but because of the way rules are issued, that means there has been a net increase in social benefits, because each of those rules had to go through the benefit-cost analysis and then review by OIRA. So if there has been—and I believe there has been—an increase in rules, that has been accompanied by an increase in net social benefits of regulation.

Chairman JOHNSON. Again, my concern is there is always going to be a bias to overstate the benefits and understate the costs. Again, with this Executive Order, including equity, human dignity, fairness, distributive impacts, that is, again, a pretty large loophole. Chairman ENZI.

Chairman ENZI. Thank you, Mr. Chairman.

I hope all of you will accept written questions afterwards. This is being chaired by two accountants. For 14 years, I was the only accountant in the U.S. Senate. Now we have two, and it shifts the focus a little bit to some specific things. But I have noticed that if we ask the accounting questions, the people in the back all go to sleep. But it gives us good information, so we will be passing that on, too.

Part of the purpose of this hearing is to figure out a way that we can do a lookback at what has already been done. When I was doing the budget, I discovered that we have 260 program authorizations that have expired, but we are still spending money on them. That is supposed to be the ability to spend money. And those 260 represent 1,200 programs of the Federal Government, and the cost is \$293 billion a year. So I am trying to get them to go back and look at those programs and see if any of them are still worth doing. We are spending money on them, so we ought to do that.

Well, in the regulatory area, we do not have that, and I am always concerned when we talk about the cost and the benefit, because I know, having been in small business, that when you get a new regulation, the cost is immediate, the benefits are over a period of time. And there is not any way for the small businessman to finance that cost on the front end to provide the benefits on the

back end. So I am trying to figure out a way through that, and I hope all of you will think about that a little bit, because that will be in some of my written questions.

I do like the approach that you can remove regulations in advance and get a credit. That would be an advantage of having one of these ledgers, and I am really excited about that.

But for Minister Clement, you mentioned in the discussion of C-21, the one-for-one rule, that it is important that the weight of Parliament be behind the aspiration that goes along with the one-for-one rule. By doing so, it adds credibility and it requires government, the Executive Branch government as well as the parliamentary branch, to take it seriously. Our major regulatory review procedures are required by the Presidential Executive Orders. They are not in statute. Could you elaborate on what you meant by that and whether the codification of the Executive Orders would be necessary? I do not know if you do it through Executive Orders up there or not, but some elaboration on that?

Mr. CLEMENT. Thank you, Senator. I appreciate the opportunity to elaborate a little bit. Primarily, we have a fused political system, so the legislative branch and the executive branch are all obtained from the same Parliament. So I serve in Parliament as a legislator, but I am also a member of the executive council that is called "the Cabinet." And so the regulatory authority is obviously through the executive branch, not the legislative branch. And it is through my position as president of the Treasury Board of Cabinet—it is a Cabinet committee—that reviews regulations usually on a weekly basis through an order, and counsel then agrees to that regulation. So that is the process.

One thing I do want to mention, though, Senator, is the back-and-forth that we have now required so that when the executive branch is doing that, there is automatically a give-and-take with stakeholders—that is to say, small business owners or what have you. So under the plan that is the Red Tape Reduction Action Plan, each regulatory department and agency has to publish forward plans 2 years in advance of what types of regulations they are planning to look at so—because what I heard from small business owners—when I was a small business owner myself, I heard the same thing—it is not only the regulation itself; it is that it comes out of the blue. All of a sudden there is a new regulation that comes from Ottawa of which they were unaware, and now they have play catchup and spend hours of their compliance time trying to figure out the regulation and how it pertains to them and how do they comply.

So by requiring the departments and agencies to publish that in advance—and there may be emergency situations and what have you, but, generally, publish in advance, it gives the small business owners a chance to either prepare for the regulation or to say to government, "I know what you are trying to accomplish there, but here is a better way of accomplishing the same public policy goal that will not crush small business with its extra burden," and have that dialogue well ahead of the Executive Order that creates the regulation.

The other thing I want to make clear is—because we are talking about costs and you Senators are from the accounting side in your

previous world experience—the standard cost model is the process we use, which I said was internationally recognized, but we require the regulator, when it calculates the cost of the regulation, we require them to consult with the stakeholders, with the small business owners, and say, “Here is what we think this regulation will cost. Do you have any comments?” And it gives the small business community a chance to say, “I think you are a bit off in that cost. We think it is Y, not X.” And, again, you have that dialogue going prior to the regulation taking effect.

So it is more or less a constant dialogue that we have set up here, and, again, that helps create a different culture in government where, quite frankly, a lot of people who are regulators in departments and agencies may never have had an experience as a small business owner and so are not really attuned to those issues until we have created this relationship.

Chairman ENZI. Thank you. I will have some more questions on that, too, but I will move to Ms. Dudley. The 1990 Regulatory Right to Know Act required the OMB to report to Congress on the cost of major regulation as part of its budget submission to Congress and offer recommendations for reform. As you pointed out in testimony, the OMB reports have been incomplete. From your experience as the OIRA Administrator, can you explain what this means and why—the ability of OIRA as an independent agency to get that regulatory baseline in the future?

Ms. DUDLEY. Yes, thank you. The OIRA reports, the OMB reports, are incomplete in three main ways: they only look at major regulations; they do not look at the regulations of independent agencies, so the Federal Communications Commission (FCC) or the Consumer Financial Protection Bureau (CFPB) would not be covered; and—oh, well, I am trying to think of what my third one is. But there are three ways.

Anyway, so, yes, those are not complete. Also, to a point that Senator Johnson was making in his last question, it is all based on agencies’ estimates of the costs and benefits of their regulation. So it is that one-off.

And if I could take a few more minutes, because I know—what Mr. Clement is talking about in Canada, the process for advance notice, we do all those things. We provide opportunities for advance notice. We have a regulatory plan. The one thing that we do not do that they are doing is there is no constraint on that, which is their one-for-one constraint.

Chairman ENZI. Thank you. My time is up.

Chairman JOHNSON. Thank you. Senator Stabenow.

#### **OPENING STATEMENT OF SENATOR STABENOW**

Senator STABENOW. Well, thank you very much. We appreciate the testimony of all of you, and it is a pleasure to be at a joint Committee hearing.

First, I am just curious. Minister Clement, in all the work that you are doing, how big is your office? How big is your staff? It sounds like you have got a pretty big operation going.

Mr. CLEMENT. Thank you, Senator. Just on the regulatory oversight staff, we have about 20.

Senator STABENOW. Ah, very good. OK. Well, I did want to indicate to both of our Chairmen that when we talk about the process—and I am all for analyzing what works and what does not work—I do want to say on behalf of everybody on the Agriculture Committee—and I see Senator Grassley here—that when we did the farm bill, we did exactly what you are talking about. We actually eliminated 100 different authorizations or programs that did not work. We consolidated—we dealt with duplication. We cut \$23 billion. I know it can be done because we did it on a bipartisan basis in the Agriculture Committee, and I would welcome that being done in every part of the Federal budget.

I do think as a contrast, Mr. Chairman, that sequestration is exactly the opposite of that. It is random, across the board, no attention to what is important and what is not important, as opposed to looking at every program and determining value of what works and what does not work. So I hope in our budgeting process as we move forward we are actually going to be more rational and come together in a bipartisan way to be able to address what is really important for the country rather than—I think sequestration is a way of giving up our responsibility to make good judgments.

I do also want to just stress that there is a value to the rule of law. I assume all of you would agree with that. I remember being in Moscow a few years ago, and they were lamenting there was not more American investment. And I went home to our great Michigan businesses and said, “Are you considering investing there?” And they said, “Well, we do not have confidence in the rule of law there.” So rules actually can create economic certainty for businesses.

And being in Haiti a couple of years ago on a trip and talking to the President of Haiti, who was looking, again, for more Americans to come—I am sure he would welcome Canadians as well—what we heard was they bring the ship into the harbor; they cannot get the product off of the ship because of the graft and corruption and all the costs that it takes, because, again, there is no enforcement, there is no rule of law, there is no economic certainty.

So in a strong economy, it is also true that having certainty, economic certainty, whether it is tax policy, not doing tax extenders at the last minute, I will say to all of us on the Finance Committee, so there is certainty is very important.

I also want to just speak a moment about really the cost-benefit analysis of the tradeoff between making sure we are not burdening small businesses or large businesses, by the same token making sure we are smart in terms of preventing additional costs or the protection of all of us in terms of safety. All of us get on airplanes every week, and we have confidence that there is, in fact, airline safety, or we all know what needs to happen on train safety or automobile safety or what happens when we eat our food or breathe the air or drink the water and so on. And so there is an importance—and shared waters with Canada and Michigan, by the way, as we know, that we care deeply about together.

So I did want to give another water analysis and just ask if any of you want to speak to, again, sort of the—Mr. Pierce, as you have, about the value—how we determine cost-benefit in terms of the public. When we think about preventing further costs by doing

things up front, avoiding spending additional dollars on crises by doing things up front, and that relates to something that, again, we share with Canada, which is the Great Lakes.

We know that because we have not paid attention to invasive species as we should, sea lamprey or addressing the treatment of power plants, the costs of that and what has happened because of zebra mussels and so on, all the economic losses, almost \$6 billion from invasive species, that if we were smart about it and had gotten ahead of it, we would save a lot of money. We would save money for our businesses who are in the boating, tourism, fishing industries and so on. So that being smart about how we address regulations and investments can also save us dollars as we move ahead, and now we have these great big fish called "Asian carp" that we are deeply worried about getting into the Great Lakes. And, again, we may need some common-sense regulatory action to protect and make sure that we have a fishing industry, a boating industry, a Great Lakes for the future of the country and certainly of the region.

So, Mr. Pierce, could you speak a little bit more specifically—you talked the most about the economic case for having common-sense regulation in terms of the value of how we look at these things, rather than all or nothing, which is what I worry about in the debate, unfortunately, here is that, all regulation is bad or all regulation is good. How do we evaluate this?

Mr. PIERCE. I cannot think of anything better than what we have been doing since President Reagan began the process. I think all we can do—certainly we never have perfect information. That is certainly true. As Professor Dudley has mentioned, it is very difficult to estimate both costs and benefits, but I do not know of anything better that we could do than use benefit-cost analysis, and we do that now. And I would be all in favor of extending it to agencies where it cannot be done right now, but that is a matter that requires statutory amendment.

I do not know of any way to improve on what we are now doing. There is constant debate among economists, political scientists, and law professors about the best way to do this, and there is constantly changes being made. But whatever problems there may be in the estimation process, it is hard for me to imagine that they could be nearly enough to offset the 3 to 15 times benefits versus costs. I mean, you would have to be really far off, OIRA would have to be very far off in its estimates of costs and benefits for us to have rules that in the aggregate cost more than their benefits.

Senator STABENOW. Thank you.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Stabenow.

I do want to just quickly make the point that I do not think anybody makes the point that, all regulations are bad. I think most of us think that regulations are very good and they provide a clean environment and worker safety. All those things are good, but there is a point of diminishing returns. I think we have to look to regulations and law to create certainty, but when we have so many laws, so many rules, so many regulations, when they are contradictory, when they are enforced at the discretion of regulatory agencies or prosecutors, you create a high level of uncertainty. So we

have to take a look at that in a very open and honest measure, find out at what point do we hit that law of diminishing returns and where do we create even greater uncertainty and start having a negative economic impact. Senator Carper.

Senator CARPER. Thanks. I apologize for being out of the room for a while. On a separate track, the Environment and Public Works Committee (EPW) is rolling out a 6-year transportation plan for our country, and I have been part of that drafting, and I needed to be there to help with the rollout, and so I apologize for missing your testimonies, all of which I have read.

I want to start, if I could, Mr. Pierce, with you and the idea—let us go back in time. You said it was Ronald Reagan who did—what did he do when he was President? Did he issue an Executive Order that said that when we are doing regulations, we have to look at cost and benefit? Was that his handiwork?

Mr. PIERCE. Yes. If you look at Order 12291—and it has been somewhat expanded and modified in various ways by each President, but the basics are still the same. The requirement is estimate benefits, estimate costs, and then choose—among alternative regulatory approaches, choose the one that produces the largest net benefits. That is the principle that President Reagan announced in Executive Order 12291.

Senator CARPER. OK.

Mr. PIERCE. Now, as Professor Dudley has pointed out, that cannot apply to all agencies in all circumstances because some agencies are not allowed to consider costs when they make decisions. But that is a function of their statutes. One of the decisions before—

Senator CARPER. EPA.

Mr. PIERCE [continuing]. The Supreme Court—it depends. There are many provisions of the Clean Air Act, the Clean Water Act. The Supreme Court<sup>1</sup> will issue a decision either today or tomorrow about one of the most important provisions of the Clean Air Act and whether it allows an agency—and independent agencies are not covered by this, and, again, that is a function of legislation. And I believe Senator Portman has proposed a bill that would change that, and I think both Professor Dudley and I support that bill.

So we would like to make this more complete, but it requires legislation.

Senator CARPER. All right. Thank you.

I said when I was here earlier in my opening statement, I talked about my Dad. I talked about his invocation that we use common sense in our work. And when I think about it, I think what Ronald Reagan proposed all those years ago meets the commonsense test for me. What are the benefits? What are the costs? And figure out what is actually a good payoff. Most of the time that works. Not

<sup>1</sup>Mr. Pierce referred to an important case involving-benefit-cost-analysis that the Supreme Court was about to decide. The Court decided that case on June 29, 2015, in *Michigan v. EPA*. A five justice majority held that the term “appropriate and necessary” in the Clean Air Act could not reasonably be interpreted to allow the agency not to consider costs in its decisionmaking. The majority held that EPA must consider cost in some way. It vacated the rule that was before the Court based on the majority’s conclusion that EPA has not considered cost at all. The four dissenting Justices agreed with the majority that it would be unreasonable for an agency to make a major decision without considering cost, but the dissenting Justices expressed the view that EPA had considered cost in making the decision before the Court.



always. But, Professor Dudley, one of the problems with that, it is hard to estimate some of these costs, isn't it? It is hard to estimate some of these benefits. And we have to make, I guess, our best effort and get as close as we can, knowing that many of them will never be perfect. But what would you say about that? How hard is it to come up with these numbers?

Ms. DUDLEY. It is hard, and the benefits tend to be more contentious, I think, than the costs, although that may be partly because we do focus more on direct costs.

In terms of the net benefit test—and I do think if you do go forward with a PAYGO budget, we will need to think hard about exactly how to do that, what costs we do want to measure, whether it is a net cost or direct cost or what. But all of us in our lives, we always want to do more than we can, than we can afford to. We have budgets that constrain us. And so a net benefit test, it is—if we could measure everything perfectly, it would be sufficient. But as with us in our daily lives and with the fiscal budget, it is not sufficient.

Do you mind if I take another minute?

Senator CARPER. No. Go ahead.

Ms. DUDLEY. The Army Corps of Engineers (ACE) is one of the few agencies that for their on-budget programs has to do a benefit-cost test. But that is a test they have to do in order to spend money on a program, but it is not sufficient. They still are constrained by a budget because they will still have so many programs that they could do that would provide the Nation benefits than taxpayers would want to afford.

Senator CARPER. OK. Mr. Clement, the job that Professor Dudley used to hold is the head of what we affectionately call "OIRA." The fellow who succeeded her, Cass Sunstein, as I mentioned, came along and said, at the urging of the President, "Let us do a top-to-bottom review of our regulations, find out which ones are just fine, which ones need to be updated, which ones need to be modified and gotten rid of in some cases."

Do you all do that kind of thing up in Canada? Do you have that periodic review?

Mr. CLEMENT. Sure. Thank you, Senator, and—

Senator CARPER. Thank you for being here.

Mr. CLEMENT. Oh, it is my honor to be here. Thank you, sir.

Senator CARPER. Thank you to the folks in Canada for being such great partners and allies of ours. We think the world of our neighbors up north.

Mr. CLEMENT. We share a continent and many interests and values, absolutely.

Senator CARPER. Yes, we do.

Mr. CLEMENT. I had the honor of meeting Mr. Sunstein actually at the start of his mandate a few years ago, and we talked about our various regulatory initiatives, and we kept in touch for sure. And we do have a life cycle for regulations that was started in 2007, so there is a systematic periodic review over time in different sections year upon year of various regulations. So we do that on a regular, systematic basis, and it provides us with the understanding of which regulations are still relevant.

As you can imagine, some regulations were more relevant in the early part of the 20th Century than in the early part of the 21st Century. One example I can give you of one of the regulations that was taken off the books was a Federal regulation of canoes and kayaks owned by commercial enterprises. Maybe there was a time when they had to have a register and had to pay a fee to register, but it really does not have a point in today's day and age. So we took that off the books, and that saved businesses about \$500,000 in compliance costs. So we do that.

If I could mention very briefly—

Senator CARPER. Just very briefly. I am almost out of time, please.

Mr. CLEMENT. OK. Well, then, I will leave it for another occasion, but thank you for—

Senator CARPER [Presiding.] Thanks so much.

Let me just close with—I do not know what your approach is in Canada on this, but before our agencies issue regulations, we expect them to go out and say to those who are going to be regulated, "What are your ideas? What do you think?" And to use that input in order to create draft regulation, and then after that draft regulation is gathered, we print that, and we disseminate that and say, "Now what do you think?" So we ask for more comment, Sometimes there is not enough comment time.

Recently, in one proposed reg, a bunch of us on one issue said, when we back to the regulation, "How about some more time? That is not enough comment time." And so that is the approach that we use. Sometimes it helps us get it right the first time. But it is hard to get it right forever, and I think the idea of coming back and doing this revisiting from time to time, plus trying to do a better job on the cost-benefit, is helpful. But thank you for showing us how you do it up there, and we are just delighted that you are in our country.

Susan, it is great to see you. Mr. Pierce, thank you so much. Rob Portman.

#### **OPENING STATEMENT OF SENATOR PORTMAN**

Senator PORTMAN. Thank you, Mr. Vice Chairman.

Thanks to the witnesses for being here. I really appreciate the opportunity to talk about a topic near and dear to my heart, and I have a vote, so I am going to talk quickly and get some responses from these experts.

Look, to me it is very simple. Congress can impose taxes on people, but so can the agencies, really, because it is much the same thing in terms of the costs for businesses. We had a town hall meeting last night, 25,000 Ohioans on a tele-town hall, and a small business owner called in, and he was there at 7:30 at night and wanted to talk about regulations and just sort of the cumulative effect of regulations, and clearly it is an issue that we have made progress on, as Professor Pierce said, but there is more to do.

One thing that is noteworthy, I think, is that when I had the honor of working with Professor Dudley when I was at the Office of Management and Budget, we put out an Executive Order—it was 13422—and it asked all the agencies to accumulate their costs and to report on those. That was rescinded in the Obama Adminis-

tration as soon as President Obama was elected, and I think it should be restored because I think it makes sense. That aggregate cost issue—it was costs and benefits of regulations—would be a good starting point to talk about this budgeting because you do need better data. As Professor Dudley has said, it is not easy.

The one thing that I thought was interesting today that came up was about the independent agencies, and talking about incremental steps, one certainly should be bringing the independent agencies more into our cost-benefit analysis. I do not know, Minister Clement, if you have this same issue, but we have executive branch agencies, of course, and independent agencies, and they are subject to different standards as to the Executive Order that Professor Pierce talked about. The independent agencies, by definition, are independent, and some of them require under the statutes that they implement to go through some analysis and some do not. And this is, I think, a good first step, again, toward a better budgeting or a better understanding of what the costs are.

I guess I would like to ask, if I could, our witnesses about that, Professor Dudley and Professor Pierce. Senator Warner, who was here earlier, and I have reintroduced our legislation to ensure Federal agencies like the U.S. Securities and Exchange Commission (SEC) or the FCC and others—and, by the way, they are doing many more major rules than they used to, so it is a bigger problem than it used to be—they perform the kind of cost-benefit analysis other executive agencies must do, and OIRA would review their work, and I wondered if you could just go on the record, Professor Dudley and Professor Pierce, talking about why you think that is important.

Mr. PIERCE. I think it is important because I think all rules should be subject to the process of estimating benefits and estimating costs, and then we should only issue the ones that are likely to produce net benefits. And I do not see any reason why the independent agencies would be any different from the executive branch agencies in that respect. So for that reason, I sent your Committee a letter—I think it was about a week ago—in support of the bill that you and Senator Warner have introduced, and I gave some more explanation for my support of that in that letter. And if I remember right, Professor Dudley sent a similar letter about the same time.

Ms. DUDLEY. Yes.

Senator PORTMAN. I think she used some of your same language.

Ms. DUDLEY. Well, he is a brilliant administrative law expert, so it was——

Senator PORTMAN. Both of you, I really appreciate your support. And, Professor Dudley, you have been involved with this issue for a long time. Your thoughts on that?

Ms. DUDLEY. Yes, regarding the letter, it was actually all the former OIRA Administrators of both parties who could sign the letter signed the letter. Some judges cannot. I think it is important for two things:

As Professor Pierce said, there is really no reason not to do benefit-cost analysis to try to get the best understanding we can of the likely effects of a regulation before it goes into effect. Why would you not want to do that?

But, second, the oversight that you provide for in your bill, the executive branch oversight I think is very valuable because it is more likely to keep the agencies accountable for doing that analysis well.

Senator PORTMAN. I am going to literally run, and I see the Chairman has returned to continue the hearing. But the other thing I just want to mention is the Regulatory Accountability Act is also legislation we introduced in the last Congress. We are still working on it for this Congress, and it has been bipartisan in the past, and it does very much of what Minister Clement talked about in terms of ensuring that the constituents—in other words, small businesses, for instance—are consulted ahead of time, requires more transparency and more consulting. It also deals with this issue of getting at the best way to achieve the results, so the least burdensome alternative is required. And I would hope that legislation as well could provide some of the baseline for beginning to think about this budget. You need to have better cost analysis and benefit analysis in order for it to work.

Thank you all very much. Thank you, Mr. Chairman.

Chairman ENZI [Presiding.] Thank you, and your vote is very much needed over there.

For those of you who do not have a program and you cannot tell what we are doing without a program—and, oh, yes, that is right, we do not do a program—what we are voting on right now is the trade preference (TPA), and this is a cloture vote that passed with 61 votes last time. So it is being repeated because the House did not get it done in the form that we sent it over. So just one of the little complexities around here, but it is something everybody is intensely interested in and absolutely expected to vote on. So they are doing that, which leaves me with an extraordinary opportunity. I usually do not get to go twice, but I am going to get to today. So I will continue with some of the things that I had listed that I was curious about, which I still will not get through them all.

When we were talking about the rules and regulations and whether—we did not really get into the Executive Orders. Executive Orders are different than regulation. We talked about how regulations have to go through this process of being reported, evaluated, and sent to different entities for evaluations and stuff. To my knowledge, that does not happen with an Executive Order. So for Professor Dudley and Professor Pierce, do you think that there ought to be some kind of a requirement for codification of Executive Orders with some kind of a sunset date if they are not codified?

Ms. DUDLEY. Executive Orders can only affect the executive branch, and the next President can come in and with a stroke of a pen eliminate the Executive Orders.

Chairman ENZI. That would be in 4 to 8 years, though, would it not?

Ms. DUDLEY. Right. So with respect to the Executive Orders that Professor Pierce talked about that guide OIRA review, one of the drawbacks of those—in response to your earlier question, I said they do not cover independent agencies; they only look at major rules; and it is also not judicially reviewable. So codifying the Executive Orders for benefit-cost analysis, which, as Professor Pierce has said, have really been in effect since 1981 with some modest

changes, I think that could be valuable because it would have that benefit-cost analysis cover independent agencies, and it would subject them to judicial review, which could be valuable. Plus it would put your imprimatur on it. It would show that Congress also believes that what Senator Stabenow was calling “common-sense regulation” is the practice that we would like.

Chairman ENZI. I would encourage us to work together a lot more. Professor Pierce.

Mr. PIERCE. I agree completely with Professor Dudley. I think having all of this—every regulation go through the same process—if it is a major regulation, you do not want to take it down to things that are not major because cost-benefit analysis itself is quite expensive and resource-intensive, and it would not make sense. Requiring it for minor actions would not pass a cost-benefit test. It is certainly true that Executive Orders do not have to pass a cost-benefit test, but they cover so many different things that it is hard to imagine how you would apply cost-benefit analysis to all of them. And the ones we have discussed require cost-benefit analysis, so I do not—and every President has agreed that, with minor changes, they should remain in effect.

I think one of the first things that a transition team does—in fact, they do it before the transition—is look at all of those Executive Orders and decide which ones they disagree with, and so far no President has disagreed with any of the Executive Orders we have discussed.

Chairman ENZI. So you would not see any need for codification then of Executive Orders, particularly the ones that are going to have a lasting effect? Again, repeating that these do not go through the same process that a regulation goes through, meaning that they are put out in advance, that people can comment on them, that the comments are supposedly looked at and reviewed and even responded—there is even a requirement about responding to them, although I have seen some of the responses which say, “No response necessary,” which I do not really consider to be a response to my constituents who are writing in heartfelt comments about some regulation. But there is not that opportunity on an Executive Order.

Mr. PIERCE. That is true, but Executive Orders, as Professor Dudley noted, apply only to the executive branch. I mean, the President does not have the power to tell people outside the executive branch what to do, and his power to tell people within the executive branch what to do is limited by statute, and each of the Executive Orders that we have discussed begins with, “To the extent permitted by law,” and usually repeats that two or three other times in recognition that Congress can override anything that the President unilaterally says on these matters.

Chairman ENZI. Unless the President has a majority in Congress. But at any rate, I think that some extra—we need to take an extra look at some of the Executive Orders, particularly as we wind down the last 6 months of anybody’s administration. I noticed some of the ones coming through at the end of President Clinton’s, and that was some effort to do ergonomics, and we do have some mechanism for reversing that, but it requires the signature of a

President. But we changed Presidents and got the signature of a President.

Going back to Mr. Clement, you have already implemented this Red Tape Reduction Plan this spring in law. Do you have plans to try and build on it? Do you have some successes so far? What are your plans with it now?

Mr. CLEMENT. Thank you, Senator. I think that is a very important question. We do plan to build on it. We continue to have a mechanism whereby stakeholders like small business organizations get to be part of the process by which we review how we are doing and make recommendations on how to proceed. So usually, my experience anyway in Ottawa has been when government is reviewing its activities, it reviews its own activities and says what a bang-up job it has done and produces a very nice report saying how wonderful everything has been.

So what we did in this case was slightly different. I created a review committee to track each year our progress on reducing red tape, particularly for small business, and we invited the stakeholders in to the committee, so they are actually at the table with government doing an independent review that is chaired by a small business representative, doing an independent report card, as we call it, of government attempts to reduce red tape, particularly for small business. They publish that, and I then, as the spokesperson and the representative of the government, have to respond to that.

So it is a very public process, and, quite frankly, their first report card from last year measured some successes, but also said there has to be some improvements in X or Y or Zed—that is how we say Z. And so, consequently, I was able to respond to that and say, “Thank you for your points. We intend to do A, B, and C in order to respond to that.”

So what I am trying to get across is it is an ongoing dialogue, and that is what makes it so powerful. And it is not just dependent upon me being, the Cabinet Minister in charge. If and when I go, the process of that continues, and I think that is very important.

Chairman ENZI. Thank you. Senator Perdue.

#### **OPENING STATEMENT OF SENATOR PERDUE**

Senator PERDUE. Well, thank you, Mr. Chairman, and I really appreciate the witnesses’ testimony here today and their willingness to help us out.

I am just a business guy, and as an outsider looking at this process, my experience has been that nothing damages small businesses more than overregulation. I have been involved in small businesses. I have been blessed to be involved with some of our country’s larger businesses. And I remember Sarbanes-Oxley and a few others, and now we are dealing with Dodd-Frank. It just seems to me that small businesses today in this recovery in the United States are really having trouble getting going, and they are, as we know, the employment engine behind our economy.

As a matter of fact, 2 months ago, Goldman Sachs Global Investment Research Group published a report—I am sure you have seen it—calling this economy “a two-speed economy.” Some large firms are prospering, outperforming market expectations. Meanwhile,

employment and growth in small firms is substantially lacking in industry averages and certainly larger companies.

The most telling, though, is the number of small firms have declined in the last 5 years. This is the first time since 1970. I am really troubled by that dynamic because I see it in my home State. I see it manifested from the workers of those small companies who are really burdened now by reduced working hours and so forth. So the people and families of Georgia are really hurting because of the overregulation. The No. 1 topic I hear when I travel back to my State among business people is that regulations are taking the life out of our free enterprise system.

So with that, I just have a couple of questions. It just seems like, first of all, there are no innocent parties in Washington. This is not something that just happened. It has been ongoing for the last 50 years. But we now get to a point where it really is hurting our competitiveness around the world.

As Justice Breyer said, "well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results. The single-minded pursuit of a particular goal results in regulatory action that imposes high costs, sometimes without achieving significant additional safety benefits."

It seems like we have gotten to the point now where our Federal Government wants regulators to take all the risk out of our lives at the expense of our free enterprise system.

So the question I have—I have a couple. I understand that the regulations that we have in the United States are divided into four big categories: economic, environmental, tax, and the Occupational Safety and Health Administration (OSHA) and Homeland Security. The question I have is: Has there been any attempt to standardize an approach to this cost-benefit analysis approach across these regulatory agencies? And has there been an attempt to standardize how we calculate the costs these regulations bear from each of these categories. I will throw it to Professor Pierce first. I would like all the panelists to respond, if you will.

Mr. PIERCE. I think that there have been a lot of efforts of that type, Senator, and there is a professor who is on the University of Virginia faculty named Michael Livermore who has done a wonderful study of the way the cross-fertilization works between, for instance, OIRA and EPA, that each of them looks at the literature all the time, and then often EPA will hire consultants to help them figure out how to do this, and a lot of the methodology developed in a regulatory agency is shared—in fact, I think virtually all of it—with OIRA, and a lot of the methodology that OIRA wants agencies to use is shared with the agencies.

Your reference to Sarbanes-Oxley, though, does take us back to most of those agencies are independent agencies. They are not subject to any of this. And so this excellent approach simply does not apply to some agencies.

Senator PERDUE. Could I add, as you mentioned Sarbanes, could I also ask you about CFPB since it is not under congressional oversight at this point?

Mr. PIERCE. It, too, is not subject to the requirement of conducting cost-benefit analysis to take a major action. So it is one of

the many independent agencies that are not subject to the Executive Orders that Professor Dudley and I have discussed today.

Senator PERDUE. OK. Professor Dudley.

Ms. DUDLEY. Yes, so I agree with your concern and with Professor Pierce's response. There are guidelines that have been adopted through notice and comment. They are long, they are hefty. They are generally recognized as solid guidance. But they are not always followed, and that is partly because there are statutes that preclude consideration of some important tradeoffs. So that is part of the problem. And independent regulatory agencies are not covered.

If agencies do not do it well, they rarely face judicial review for that. There are some statutes that allow it, but the Executive Orders that require benefit-cost analysis are not judicially reviewable.

So I think there are several reasons why you are right that agencies are not really doing as robust a benefit-cost analysis as they could, which might get back to Senator Enzi's suggestion that maybe we should be codifying the Executive Orders that require that type of analysis.

Senator PERDUE. Minister.

Mr. CLEMENT. Senator, I will just confine myself to a couple of basic points.

One is Prime Minister Harper of Canada has called red tape the "silent killer of jobs," and I think he is absolutely correct. That is why this was part of our previous election platform that we have implemented over the last 4 years to reduce that burden on small businesses.

The other thing I would say is something that you already know, but that if you do not measure it, it does not count. In government, if you do not have a means by which you are assessing the costs and benefits, then it becomes just a moot debate. And so I do—certainly, my experience has been as we have measured this more and more closely and more and more precisely, it creates the dynamism necessary to actually get something done that is different.

Senator PERDUE. In Canada, have you guys been able to standardize across your various platforms as well?

Mr. CLEMENT. So we use something called the "standard cost model," which is an internationally recognized calculation—it is a formula, basically, that assesses the administrative burden on business, looking at the number of hours it takes to fill out the forms times the number of people necessary to do so times the number of businesses affected. I am very much simplifying it, but that is the basis of it, and as I say, it is an internationally accepted methodology, and it seems to be working.

Senator PERDUE. Great. Thank you very much.

Thank you, Mr. Chairman.

Chairman JOHNSON [Presiding.] Thank you, Senator Perdue. Senator Ayotte.



# **OPENING STATEMENT OF SENATOR AYOTTE**

Senator AYOTTE. Thank you, Chairman. I thank all of you for being here.

I had a question about small businesses, and small businesses are obviously responsible—I happen to be married to a small business owner—for nearly two-thirds of job growth in this country, and I think the challenges for regulation has become even greater with small businesses. Their ability to move forward right now with 3,000 regulations currently in the workers, just even as a small business owner, knowing what those regulations are and how to apply them seems to me to be a big challenge in terms of wanting us to allow small businesses to drive growth. And I was wondering, Mr. Clement, how Canada has been successful at reducing the regulatory burden, particularly on the smaller businesses. And I would also ask Ms. Dudley as well, while you were OMB Administrator, what do you think in terms of dealing with small businesses that would be more effective? Minister Clement.

Mr. CLEMENT. Thank you, Senator. It is an honor to be here and to respond to your concerns. I have been mostly focusing my remarks on what we call the “one-for-one rule” for new regulations being put into place. An equal number or a larger number of regulations in terms of the administrative burden have to be removed from the books so the net impact on small business is either neutral or positive. And so that has been the focus of a legislative package that I had passed through Parliament earlier this year.

We also do things, which I understand from the testimony are done here as well, forward regulatory plans so that each regulating department or agency has to project 2 years into the future and publish, “Here is what we plan to do; here is what we think the impact on small business is going to be. Small Business, what do you say? Is this something that you can meet, or should we be changing our plans in some way to meet the public policy goal without creating the burden,” and starting that dialogue early.

Senator AYOTTE. So 2 years in advance?

Mr. CLEMENT. Two years in advance, 24 months in advance.

The other thing that we do was add what we call a “small business lens” to every regulatory package. I am president of something called the “Treasury Board.” We mostly cut budgets, but we also deal with regulations. And so when a regulatory proposal is put before us by a minister or by an agency or by a department, they have to include within that package of information the likely impact on small business in particular. And the reason that that is important is because what I have noticed over time is that, quite frankly, the public service they have a lot of knowledge and a lot of experience. Not many of them have been involved in small business. That has not been part of where they have come from or what they have learned or so forth. So to force them to actually have the dialogue with small business, say, “How will this affect you?” and then include that in the package means that I as a decisionmaker, an elected politician, a Cabinet minister, I am now aware of some of the costs associated with that reform package, that regulatory package to small business, and that makes me more sensitized to that impact.

Senator AYOTTE. I do not know if anyone wanted to add anything to that.

Ms. DUDLEY. Yes, I can just talk a little bit about how it is done in the United States. You had asked what OMB's responsibility is. OMB is responsible for looking at small business impacts, working with the Small Business Office of Advocacy, and they both have statutory responsibilities under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. And some agencies actually—OSHA, EPA, and the Consumer Financial Protection Bureau have to have earlier advance notice and evaluation of the rules.

Another thing—

Senator AYOTTE. Sorry to interrupt you. As I understand it, that is because the Regulatory Flexibility Act allows that. I actually have a bill to expand that across all agencies.

Ms. DUDLEY. Yes, it was kind of started as a pilot, but, yes, it might be appropriate to expand it across agencies.

Now, also, the Reg Flex Act under Section 610 requires agencies to look at the economic impact of their regulations on small businesses retrospectively every 10 years. They are supposed to evaluate whether there are ways to do that that is better for small businesses. That has not been effective. It just has not been effective, which is why I think some of the incentives that you all are talking about here could make that more—it would provide incentives to really look back. As Mr. Clement said, looking back alone, you did not change the culture until you added the incentive of the one-for-one.

Senator AYOTTE. How do we deal with this issue of cost-benefit analysis, cost impact? Because one of the feedbacks I get, particularly from smaller businesses, is that you can imagine that in a smaller business you do not have an army of lawyers and accountants, and, frankly, big business has an ability to comply with regulations in a way that small businesses do not, because they just do not have the personnel and people focusing on this. And I think sometimes, as I look at how the government does this cost-benefit analysis, it does not really truly take in the costs and the viability, especially on smaller entities. How can we improve that piece of it? Anyone who would like to weigh in.

Mr. PIERCE. As Professor Dudley described, we do a lot of that now. There are two statutes that require that. It is the responsibility, as I recall, of OIRA to administer those statutes.

When you look at agency rules, many—in fact, I am pretty confident the vast majority have exceptions for small businesses. Now, there are a lot of problems with that because what happens a lot is that large businesses then try to game the system, and all of a sudden you discover that a large corporation has created 50 small businesses that they then say are—so it is actually quite difficult to try and figure out what businesses are subject to these exemptions, and you have to assume that there will be a lot of gaming of any exemptions by big business to get the advantages of the exemptions for small businesses. But we have a process now that applies to all of that, and it is required by law.

Senator AYOTTE. Well, my experience from hearing from folks on the ground is that that process is not fully effective, and almost

like this idea that the people who are reviewing it and doing the cost-benefit analysis, they do not think about what it would take to be in this small business and do some of the things we are asking people to do. That is just feedback I hear from the ground, and, I hope my husband builds his small business, so I know how hard our small business owners are working just to survive every day.

Mr. CLEMENT. Senator, one of the things we do in Canada is this standard cod model where we actually involve the small business representatives in calculating the cost of the new proposed regulation on small business—How many hours does it take to comply? How long do they have to sit in their office filling out the forms? What is the opportunity cost of that?—as opposed to going out and creating wealth and working on their business.

So we actually created a formula based on international practice to measure that cost of compliance, but it is not just, somebody in Ottawa in some office somewhere applying the formula. They have actually got to talk to the small business stakeholders to make sure the formula is being applied in the particular case of the proposed regulation in an appropriate manner.

Senator AYOTTE. All right. Thank you.

Chairman JOHNSON. Professor Dudley, did you want to respond to Senator Ayotte? It looked like you might have.

Ms. DUDLEY. Thank you very much. Yes, just one more point on that. Often the costs that really affect the small businesses, especially the innovators, they are not direct costs. They are hard to measure. And so if you are innovating some new ideas, you really cannot bring them to market without just selling your ideas to a larger company. So I think part of the problem is that those costs are just hard to measure.

Chairman JOHNSON. Thank you, Professor Dudley and Senator Ayotte.

Professor Pierce, you have been involved in this issue for quite a few years, I think my intro said for 38 years. From my standpoint, the reason you have the rule of law, one of the reasons, is to create certainty, to lay out the rules of the road, things like the Uniform Commercial Code—extremely valuable. You have, national standards to govern interstate commerce.

Do you think the regulatory environment today creates a higher level of certainty than it did 38 years ago in your experience? Have we improved certainty?

Mr. PIERCE. That is a hard question to answer.

Chairman JOHNSON. I can answer it.

Mr. PIERCE. I am not at all sure that we have.

Chairman JOHNSON. Let me ask it a different way. Do you think it is easier or harder to start a company, to build a company, to create jobs? Is it easier or harder 38 years later?

Mr. PIERCE. I do not know.

Chairman JOHNSON. Well, I can tell you, talking to countless business executives who have told me independently, they were coming up to me and saying, “Ron, there is no way I could start my business and build it the way I have if I had to start it in this regulatory environment.” And that is from multiple people, very successful, just taking a look at what is happening.

Professor Dudley, it seemed like you wanted to weigh in on this.

Ms. DUDLEY. I do not have statistics on it. I know surveys of small businesses say that it is harder, but I do not have data.

Chairman JOHNSON. Mr. Clement, you were an entrepreneur yourself. Again, Canada is different than the United States. By the way, has anybody conducted a study in Canada in terms of the overall cost of the regulatory burden of your 129,000 regulations, some estimate?

Mr. CLEMENT. So we have a study done by the Canadian Federation of Independent Business, which we rely on. They are an independent body representing small business owners in Canada, and their costing of the impact of regulation of all levels of government, not just the Federal level but provincial—we have a provincial like your State level—and then the local municipal level, is about \$30 billion in the Canadian economy.

Chairman JOHNSON. OK.

Mr. CLEMENT. So it is quite substantial, similar to what some of the numbers you were mentioning here in the United States of America. And, clearly, as Prime Minister Harper has said, that is the silent job killer that we have to start talking about and taking seriously.

Chairman JOHNSON. It would be interesting to compare, because studies we have—Senator Enzi was talking about \$1,880 billion, or I like to say close to \$2 trillion. So it would be real interesting to compare those different studies to find out what the real comparison is.

Mr. Clement, you also made an interesting comment about the fact that regulators have never been involved in the private sector. I want you to expound on that a little bit more, because certainly that is what I find, too. I mean, if you do not understand the burden, if you are just here thinking of all these wonderful benefits of your agency's new regulation, you really do not have much sympathy for really the compliance burden, do you?

Mr. CLEMENT. Right. So in our case, Senator, what I can say is there is a little bit of entering and exiting the private sector world at the senior levels of the bureaucracy, but that is usually with larger businesses. That is certainly the evidence that I have found, is that they usually go to larger firms who have large compliance departments, armies of lawyers and accountants and what-not who can help the company deal with the compliance costs of doing business.

It is not usual, at least in our political culture, for senior public servants or any public servants to back that experience with small business. I am not condemning them for that. It is just the way it is. And so what we have tried to do was at least sort of build that into the consultation process because it was not natural in the culture of the place before we started this initiative.

And just to expound on it very briefly, we are legislators. We are legislators, and because I am part of the executive branch, we have the executive part of our business as well. So, the whole system is erected so that if you face a problem—which we all want to solve. That is why we are in politics in the first place. We want to solve problems and make sure our country does better. So the first go-to point is you either legislate or you regulate. That is kind of how the place was built.

And so what we are trying to do is change the culture so that they realize that there are other mechanisms and tools available that maybe the only way, as Senator Stabenow—in some cases, the only way forward is legislation and regulation. I am not denying that. But in many cases, there are other more creative ways that can be found that can deal with the public policy issue that does not involve legislation and regulation. And we have to do more nudging and less using the hammer in all situations.

Chairman JOHNSON. Trust me, the bias is toward addition, writing new—I mean, after all, we are legislators so we tend to legislate. So we need to have something subtractive.

Chairman JOHNSON. Professor Pierce, you made an interesting comment about how, when we exempt small businesses from some of these regulations, then the large corporations game the system. Do you have any good example of that? Because I think we see that all the time.

Mr. PIERCE. I have seen many examples of it described in the literature. One that I recall offhand is FCC auctions where small businesses are given preferences, and then when you look at what the small business is, it is not so small. It has 100,000 employees, and they have just created a subsidiary for the purpose of participating in the auction, getting the benefit.

Unfortunately, we see the same kinds of problems fairly frequently with respect to preferences for minority-owned businesses and female-owned businesses. As soon as you provide any benefit, there are going to be people who hire good lawyers to figure out how to take advantage of the benefit, and that creates a real problem for you; it creates a real problem for the people who write the rules in the agencies. I do not have a real easy fix for that problem.

Chairman JOHNSON. I think one of the things we have to do, if we are going to do a regulatory budget, is we have to calculate the cost of the unintended consequences, which is really kind of the definition of Washington, D.C.

One last question for Professor Dudley. Because you have been involved in this issue for quite some time as well, and we have the Administrative Procedures Act. What is your sense in terms of Executives—Presidents—the executive branch following that Administrative Procedures Act? Is there greater compliance or less compliance? Or is it pretty much about the same?

Ms. DUDLEY. I am not sure of the answer to that. I think it is about the same because it is required by law, and we are such a litigious society that if agencies do not follow the procedures and solicit notice and comment, they can be sued. I have seen a couple things lately I am very curious about. The trans fat announcement that was made just this week, I do not think that went through notice and comment. So there are some things that I am curious about, but—

Chairman JOHNSON. We do know that President Obama's executive amnesty has been basically—there is a stay because he did not follow the Administrative Procedures Act as well, so there are certainly different examples of that.

Chairman ENZI, do you have any further questions?

Chairman ENZI. I have some questions that I will send in that will become a part of the record later, I hope.

Chairman JOHNSON. OK.

Well, with that, again, I just want to thank our witnesses for your taking the time, your thoughtful testimony, your thoughtful answers to our questions.

This hearing record will remain open for 15 days until July 8 at 5 p.m for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 11:55 a.m., the Committees were adjourned.]

## A P P E N D I X

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### **Opening Statement of Chairman Ron Johnson** ***“Accounting for the True Cost of Regulation: Exploring the*** ***Possibility of a Regulatory Budget”*** ***June 23, 2015***

*As prepared for delivery:*

Good morning and welcome.

Today’s hearing is part of our continuing effort to move us toward an efficient and accountable regulatory system. We’ve called this joint hearing with the Budget Committee to explore ways that sensible budgeting mechanisms could be used to take hold of the federal regulatory system and ensure a more prosperous future. I’d like to thank my colleagues who serve on the Budget Committee, particularly Chairman Enzi and Ranking Member Sanders, for working with our committee on this critical issue.

Congress often doesn’t pass laws anymore – it passes frameworks, authorizing broad powers for regulatory agencies that are used to promulgate all kinds of rules and regulations. While some of these regulations are necessary to implement the law, some are also beyond the scope of congressional intent and unnecessarily burden businesses and families. In 2014, according to the Competitive Enterprise Institute, each new law passed by Congress resulted in 16 new regulations. Unfortunately, this system benefits both Congress and the executive branch: Congress gets to hold at arm’s length any potential consequences of the laws it passes, and agencies are often given limitless authority to regulate.

Congress needs to take control of the regulatory system and assume some accountability for the results. Fortunately, other countries, such as Canada and the UK, are leading the way by showing us that regulatory budgeting policies can work and find popular national support.

We need to find ways to force the federal government to be explicit about the economic costs it imposes on the country, incentivize agencies to seek continuous improvement of their existing rules, and put Congress on the hook for authorizing regulatory costs.

Today we will focus on two main topics: (1) how has Canada’s “One-for-One” rule, the first such policy enacted by legislation, worked to limit that country’s regulatory burden, and (2) what lessons Canada’s experience has for us as we investigate such a system for the United States.

Our overarching mission for this committee is to ensure the economic and national security of America. A regulatory process that works for, not against, America’s families and businesses is foremost in achieving that goal.

Thank you. I look forward to your testimony.

**Statement of Ranking Member Thomas R. Carper**

*"Accounting for the True Cost of Regulation:  
Exploring the Possibility of a Regulatory Budget"*

June 23, 2015

*As prepared for delivery:*

Good morning, everyone. Our thanks to each of you for joining us this morning.

I've long believed that one of the most important roles for government is to create a nurturing environment for job creation and job preservation. Among the elements needed for that nurturing environment are these: access to capital; public safety and the rule of law; a robust transportation system; a reasonable and predictable tax system; affordable, quality health care; a clean environment; good schools and a world-class workforce; access to key decision makers; and finally, common sense regulations.

Regulations help consumers feel confident that the products they buy and use every day are safe. Thoughtful regulations provide businesses with the predictability that they need. They play a major role in our daily lives, and usually in positive ways. Every time we go to the bank, drive a car, or take a breath of clean air or a drink of clean water, we are enjoying the benefits of regulations.

Of course, the regulatory process can be cumbersome at times. And many regulations oftentimes do impose some additional costs and requirements on businesses and on others who must comply with them. But I disagree with those who think that we have to choose between regulation and having a robust, growing economy.

For example, common-sense, cost-effective regulations to address our nation's environmental and energy challenges help to reduce harmful pollutants and lower our energy costs. They also help the economy by putting Americans to work in advanced manufacturing jobs to create new products.

I like to say that many of the laws Congress enacts can be likened to a skeleton. When regulations are adopted, they provide the meat on the bones. Congress can't always include in legislation the minute details so we must ensure that the regulatory process results in regulations that achieve the objectives laid out in the laws that Congress passes. To that end, it is important that we conduct oversight of the regulatory process to try to reduce burdens and encourage transparency.

As we work to reduce burdens, however, let's not forget about the benefits that flow from most regulations. I worry that that is the fatal flaw in many discussions of a 'regulatory budget' or 'regulatory pay-go' that is the subject of today's hearing. Such a system does not account for the many benefits that regulations can and do provide.

Excluding benefits from the equation may lead to the repeal of a rule and a reduction in the burden it places on businesses. But doing so ignores the potentially ignores much greater benefits, economic and otherwise, that that rules can bring to society as a whole. That would be a mistake.



To be honest with you, I have some concerns with the idea that an agency's ability to implement a new rule could depend on it repealing an older one first in order to meet its 'regulatory budget,' when in fact the older regulation may still be necessary. Or maybe even worse, an agency may delay implementing a much needed rule because an offset can't be found.

For example, the EPA could be forced to choose between issuing the proposed Clean Power Plan rule to regulate carbon pollution or keeping the Mercury and Air Toxics rule to regulate mercury emissions. It doesn't make sense to make the EPA choose which air pollutants to regulate to protect public health just to fit within the restrictions of a regulatory budget.

That said, I'm a strong supporter of efforts to identify existing regulations that should be modified or repealed. I have been encouraged by the Administration's work in this arena and by the personal commitment the President has shown to these efforts to conduct retrospective reviews.

It's my understanding that the Administration has already identified ways to reduce burdens and save billions of dollars. I want to work with the Administration so that we can find ways to build on those results.

My colleagues have oftentimes heard me say that we should always be looking for what works and do more of it. That includes looking to the states and other countries to learn what we can from their experiences. I look forward to hearing the discussion from our witnesses today and to learning more about how Canada has grappled with these issues. Thank you all for being here.

###

**Opening Statement  
Senator Michael B. Enzi**

**Accounting for the True Costs of Regulations:  
Exploring the Possibility of a Regulatory Budget  
June 23, 2015**

Thank you Chairman Johnson for hosting this joint hearing today. Welcome to Minister Clement, Ms. Dudley and Mr. Pierce. Mr. Clement, we appreciate you making the time in your busy schedule to visit with us and share your success in addressing the regulatory burden on the economy in Canada.

Last month, for the first time since 2001, Congress agreed to a joint ten-year federal budget that put our nation on a path to a balanced budget. According to the Congressional Budget Office, a balanced budget will boost the nation's economic growth and help provide more than one million new jobs over the next ten years.

The Budget Committee is now working to enforce the spending targets laid out in the budget to make sure we stay on that path. But we have no such accounting and enforcement system when it comes to the regulation side of the ledger.

The absence of such a system for regulations is an increasingly odd deficiency. Why not also address an area of government that would have the biggest positive impact on the lives of hardworking Americans by making our government less intrusive?

#### **WHAT DOES AMERICA'S GROWING REGULATORY BURDEN COST?**

The burden of government regulation continues to grow for each and every American. One study estimated that the regulatory burden in the United States costs more than \$1800 billion (1.8 trillion) in 2014 and was bigger than the entire GDP of India. This burden is dragging down our economy when we should be working to boost economic growth and help create

more jobs. These regulations are particularly hurting small businesses, which traditionally are America's economic engine.

Over the years, we have tried various reform mechanisms to control red tape. Dating back to the 1980s, the executive branch has tried to control the flow of government agency regulations through executive orders mandating regulatory impact assessments on major rules. Agencies are tasked with measuring the paperwork burden of legislation, and laws have been passed to assess the small business impact of legislation.

I strongly support these efforts, but if you asked the average small business owner in Wyoming if red tape has been reduced, he or she would probably shake their head NO. We have a lot of work to do, because the regulations, and the burdens they place on each and every American, keep growing.

## **WHAT CAN WE DO TO HELP EASE REGULATORY BURDENS?**

Minister Clement, I'm especially looking forward to hearing more about your successful Red Tape Reduction plan in Canada. We have a regulatory accounting system in place here as part of the Office of Management and Budget, which is supposed to regularly report on the costs of major regulations. However, that report does not encompass the whole government and is not built into any type of regulatory measurement reduction system. It is almost like watching a fire slowly burn down a house without ever calling the fire department.

In particular, I'm interested in how the one-for-one rule requires regulators to monetize and offset any increases in administrative burden that result from regulatory changes with equal reductions from existing regulations.

I'm excited about today's hearing in part because we are going to hear a fresh perspective from those who have waged

successful campaigns against red tape. Under Mr. Clement's leadership, when it comes to lowering regulatory burdens, Canada has experienced annual estimated compliance savings of 290,000 hours, **which is equal to more than 33 years. That is time that individuals can use to grow their businesses or improve their work.**

This Congress has a number of measures pending that would address regulations. However, we need to explore better ways to actually measure their costs in order to find more effective controls and procedures for eliminating unneeded and redundant regulations.

### **CAN WE MAKE GOVERNMENT MORE EFFECTIVE?**

We know that one of the best ways to balance our budget is to make our government more efficient and accountable. Scrutinizing the rules and regulations that are hurting hardworking Americans helps us do both. If we do this, we can start to see what isn't working and eliminate those regulations, while

streamlining what's left to help make our government more effective.

If government regulations are not delivering results, they should be improved, and if they are not needed, they should be eliminated. **It is time to prioritize and demand results to ensure that government works for the people, instead of the people working for the government.**

Congress has a responsibility to help make it easier for hardworking Americans to grow their businesses or advance in their jobs, instead of worrying about inefficient and ineffective regulations. True regulatory reform can help serve as the foundation for helping all Americans grow and prosper.

There are many different options, and that's why I look forward to this conversation, beginning with our work here today.

Thank you, Mr. Chairman.



**Statement for the Record  
By Senator Sheldon Whitehouse  
June 23, 2015  
Senate Budget Committee**

In my eight years in the Senate, I have seen numerous partly-line votes in which Republicans vote to block or repeal laws and regulations in an attempt to help industry, without regard to public health, the environment, or broader economic consequences. Such narrow focus misses the other side of the equation—the benefits to society that often flow from regulations. Thankfully, despite the premise of this hearing—that we lack a regulatory budget—the federal government has for decades considered the full picture of proposed regulations.

Beginning with President Reagan, federal agencies have been required to demonstrate that estimated benefits of proposed regulations outweigh the estimated costs. I'm happy to discuss fine-tuning that process and reforms that would make regulations less burdensome, more efficient, and more up to date. Unfortunately, that's not what Republicans have proposed today. Instead, they seem to favor an analysis that looks only at costs to businesses and a PAYGO-type structure that presupposes all regulations are costly.

We've seen time and again that the benefits of regulations can vastly outweigh the costs. To take one prominent example, a peer-reviewed 2011 EPA report estimated that the benefits of the 1990 Clean Air Act amendments will have surpassed the costs by a factor of 30-to-1 by 2020. The same study found that these regulations avoided 160,000 premature deaths, 130,000 heart attacks, millions of cases of respiratory problems, and 86,000 hospital admissions in 2010 alone. In addition, the pollution control industry itself supports a considerable part of our economy. It generated \$300 billion in revenue and \$44 billion in exports in 2010.

There's also a rich history of industry overestimating the costs of proposed regulations. When the 1990 Clean Air Act amendments gave the EPA the responsibility to regulate sulfur dioxide, the Edison Institute predicated that the cost to ratepayers would be \$7.1 billion per year by 2000. OMB estimated in 2003 that these regulations in fact cost less than a quarter as much as Edison projected. OMB also estimated that these regulations cost about \$150 per ton in 1995 and generated a benefit of \$7,800 per ton. In the words benefits exceeded costs by a factor of 52.

In 1990, DuPont testified that accelerating the phase-out of ozone-depleting chlorofluorocarbons would cause "severe economic and social disruption." A decade later EPA estimated that every dollar invested in ozone protection provides \$20 in health benefits to Americans.

Finally, looking a bit farther back, in 1974 Chrysler predicated in Senate testimony that CAFE fuel efficiency standards would "restrict the industry to producing subcompact



cars—even smaller ones—within five year.” Forty years later, and American automakers are still producing large automobiles, include sport utility vehicles.

I think every Senator wants laws and regulations to be designed and executed as efficiently as possible. Once again, I’m certainly willing to work on regulatory reforms that ensure that regulations are carried out in ways that minimize burdens and maximize benefits. I am not willing, however, to accept the Republican contentions that all businesses are overregulated and that all regulations are costly to society. Those contentions are disproved by the facts.

**Statement of the  
Honourable Tony Clement,  
President of the Treasury Board of Canada**

**Before the**

**U.S. Senate Committee on Homeland Security and Government  
Affairs and the Senate Committee on the Budget**

**Concerning**

**“Accounting for the True Cost of Regulation: Exploring the  
Possibility of a Regulatory Budget”**

**June 23, 2015  
SD-G50, the Dirksen Senate Office building  
Washington**

Good morning.

Thank you Chairman Johnson, Chairman Enzi, Ranking Member Carper, Ranking Member Sanders, and distinguished members of the committees for inviting me here today.

It is a distinct honour to speak to you on an issue of concern to both our economies — the reduction of excessive federal regulatory burden in our countries.

I am the President of the Treasury Board, a senior Cabinet position, and have served in this position for the past four years. I also serve on the Cabinet Committee on Priorities and Planning, which is led by Prime Minister Stephen Harper. I have previously held other Cabinet positions, in my role as Minister of Industry and Minister of Health.

In my capacity as President of the Treasury Board, I spearheaded the development and implementation of a cross-government spending review—looking at transformational ways to support and deliver services to taxpayers in the most effective and efficient means possible.

This work follows through on the Government of Canada’s commitment to eliminate the deficit, balance the budget and continue to strengthen the economy.

In Canada, where I have the pleasure of leading our nation’s efforts to reduce federal red tape, we recently celebrated an important milestone in this regard.

In January 2014, I introduced bill C-21 – the Red Tape Reduction Act – in Parliament to control the administrative burden that regulations impose on business.

On April 24<sup>th</sup> of this year, our House of Commons voted overwhelmingly to make our “one-for-one” policy the law.

The bill, known as *the Red Tape Reduction Act*, enshrined into law a rule that places strict controls on the growth of regulatory red tape on business.

The one-for-one law has two key parts.

First, it requires that regulatory changes which increase administrative burden costs be offset with equal reductions in administrative burden.

And second, ministers of our federal government departments are required to remove at least one regulation each time they introduce a new one that imposes administrative burden costs on business.

This legislation will not only benefit businesses but all Canadians through its powerful positive effect on business productivity and the economy.

This has already been proven.

Our Government first introduced the one-for-one rule three years ago. Over the first two years we saw hard evidence the rule was reducing the administrative burden on business.

We know, for example, that as of May 20<sup>th</sup> of this year, the rule has saved businesses about \$32 million (Cdn.) in administrative burden.

This represents an estimated reduction of almost 750,000 man hours annually in time spent by businesses dealing with regulatory red tape.

These encouraging results, is why our Government decided to enshrine the reduction of red tape in law.

We see a clear signal of a cultural shift taking place within our federal regulatory system — systematic and sustained control of red tape is now the new reality.

And Canada has become the first country in the world to give such a rule the added muscle of legislation.

There is another aspect of Canada's efforts to reduce administrative burden on businesses.

While it committing to reducing the amount of regulations on the books, we also need to know how many regulations are in play.

In our Red Tape Reduction Action Plan – which I will speak to in a moment – the Government of Canada committed to establishing a baseline inventory of requirements in federal regulations and associated forms that impose administrative burden on business.

The Administrative Burden Baseline count will contribute to the openness of the federal regulatory system.

We further committed to publicly report this information every year as part of efforts to maintain transparency in monitoring and reporting on regulatory red tape.

By the end of 2014, the Government had calculated a total of 129,860 federal requirements in regulations and related forms that can impact Canadian businesses across different sectors and industries.

The Administration Burden Baseline count complements the One-for-One legislation as we fully comprehend the regulatory burdens and their effect on business.

Now, some of you may be wondering how the rule works in practice.

An example can be found at Health Canada.

They have reduced red tape burden by amending regulations to allow regulated pharmacy technicians to oversee the transfer of prescriptions from one pharmacy to another — a task that was previously restricted to pharmacists.

This enables pharmacists to spend more time providing advice to and serving customers, while running their businesses.

This alone reduces burden by \$15 million a year.

These example underscores the importance of reducing red tape for the small businesses that are the backbone of the Canadian economy<sup>1</sup> — our job creators.

Prime Minister Stephen Harper has said, “Small businesses are key drivers of our economy, accounting for 98 per cent of all businesses in Canada, employing nearly 70 per cent of our private sector labour force, and contributing to approximately 40 per cent of our GDP”.

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<sup>1</sup> On the Prime Minister of Canada’s website at <http://pm.gc.ca/eng/news/2013/10/20/statement-prime-minister-canada-small-business-week>, it notes: “Small businesses are key drivers of our economy, accounting for 98 per cent of all businesses in Canada, employing nearly 70 per cent of our private sector labour force and contributing approximately 40 per cent of our gross domestic product.”

We recognize the important contributions made to the economy by small businesses across the country, as well as the challenges they face.

We understand that to succeed, they need an environment of low taxes and minimal red tape. And we are committed to creating that environment.

We want our businesses to be able to innovate, expand and create more jobs, particularly in this time of economic uncertainty.

That's why Prime Minister Harper, launched Canada's Red Tape Reduction Commission back in January 2011.

The Commission carried out extensive consultations with businesses and business groups across Canada.

Members of the Commission met stakeholders at a number of face-to-face roundtables in 13 cities across Canada, attended by representatives from a wide range of businesses and associations.

Roughly 2,300 submissions were given to the Commission to examine.

Here is what the Commission heard.

It heard that regulations were put in place without sufficient recognition of the needs of businesses or the impacts on them.

Business owners also told the Commission that regulators did not understand what entrepreneurs had to do to succeed and were actually making it harder for them to do so.

Stakeholders said that the regulatory system lacked sufficient predictability, often making it difficult for them to undertake business planning with reasonable certainty.

In September 2011, the Commission released Report.

Then, our Government took action.

In October 2012, I launched the Red Tape Reduction Action Plan to eliminate unnecessary regulatory red tape, while maintaining high standards for safety and protection for our citizens.

Our action plan is in keeping with our strong commitment to maintaining high health, safety, and national security standards for Canadians.

Canadians count on their government and on their regulatory system to uphold the public trust.

And I can assure you that while we are freeing businesses from unnecessary, costly and time-consuming red tape, we are continuing to protect the health and safety of our citizens.

That is very important, and went a long way toward garnering broad-based support for the legislation.

Laura Jones, Executive Vice President of the Canadian Federation of Independent Business said, "The effort to control red tape got a big boost today when C-21 became law. The stick-to-itiveness from the Prime Minister, Minister Clement and colleagues with respect to implementing the Red Tape Action Plan on behalf of small business deserves applause from all Canadians as it is critical to our economic well-being going forward."

As you can see, we are working to help businesses succeed, and to cement Canada's reputation as one of the best places in the world in which to do business and invest.

We believe in Canadians, and the ingenuity and determination of hard-working people that creates economic growth, jobs and long-term prosperity.

In the spirit of our two countries' shared values, and the efforts of the Regulatory Cooperation Council to make regulatory cooperation a routine and ingrained practice between us, I wanted to share Canada's approach with you.

I would sum up by saying that, in Canada; we have made reducing red tape central to our economic plan for jobs and growth.

And the message we're sending to our largest trade partner and other countries is that Canada is on the side of the job creators — and Canada is open for business.

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Thank you.

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## Regulatory Studies Center

THE GEORGE WASHINGTON UNIVERSITY

June 23, 2015

United States Senate Committee on the Budget and  
Committee on Homeland Security and Governmental Affairs

Hearing on:

### **Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget**

Prepared Statement of Susan E. Dudley

Chairman Johnson, Chairman Enzi, Ranking Member Carper, Ranking Member Sanders, and distinguished members of the Committee, thank you for inviting me to testify at this joint hearing on “Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget.” I am Director of the George Washington University Regulatory Studies Center, and Distinguished Professor of Practice in the Trachtenberg School of Public Policy and Public Administration.<sup>1</sup> From April 2007 to January 2009, I oversaw executive branch regulations of the federal government as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

I appreciate the Committees’ interest in exploring the possibility of a regulatory budget. Taxes, and subsequent spending, are one way the federal government redirects resources from the private sector to accomplish public goals. Regulation of private entities—businesses, workers, and consumers—is another. Like the programs supported by taxes, regulations provide benefits to Americans. However, the costs associated with regulatory programs are not subject to the same checks and balances.

As an OECD paper observes, “while governments are required to account in detail for their fiscal spending, regulatory costs or ‘expenditures’ are still largely hidden and there is still no accountability for the total amount of regulatory expenditure which a government requires.”<sup>2</sup>

<sup>1</sup> The George Washington University Regulatory Studies Center raises awareness of regulations’ effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

<sup>2</sup> Nick Malyshev, *A Primer on Regulatory Budgets*, OECD JOURNAL ON BUDGETING, 2010/3.

Because regulatory costs are less visible (regulations have been called a “hidden tax”<sup>3</sup>) and they are assumed to be borne by businesses (even though individual consumers and workers ultimately bear them), regulatory tools may seem preferable to direct spending programs for accomplishing policy objectives. As a result, the scope and reach of regulation has been growing.<sup>4</sup> (An attachment to this testimony presents some proxy measures to illustrate this.) In 2015, there are over 70 federal agencies, employing almost 300,000 people to write and implement regulation.<sup>5</sup> Every year, they issue tens of thousands of new regulations,<sup>6</sup> which now occupy over 175,000 pages of regulatory code.<sup>7</sup>

In the U.S., individual regulations are constrained by 1) their enabling legislation, 2) the Administrative Procedure Act, which requires agencies to provide public notice and seek comment before issuing new regulations, and 3) executive requirements for regulatory impact analysis. Presidents of both parties for over 40 years have supported ex ante impact analysis of regulations as a way to make agencies weigh the likely positive and negative consequences of regulations before they are issued.

Executive Order 12866,<sup>8</sup> issued by President Clinton in 1993, continues to guide the development and review of regulations today (having been reinforced by both President Bush and President Obama). It expresses the philosophy that regulations should (1) address a “compelling public need, such as material failures of private markets”; (2) be based on an assessment of “all costs and benefits of available regulatory alternatives, including the alternative of not regulating”; and (3) “maximize net benefits” to society unless otherwise constrained by law.<sup>9</sup>

<sup>3</sup> Wendy L. Gramm, *Regulatory Review Issues, October 1985–February 1988*, 63 ADMINISTRATIVE LAW REVIEW. (2011).

<sup>4</sup> The GW Regulatory Studies Center’s “Reg Stats” page provides various measures of regulatory activity. <http://regulatorystudies.columbian.gwu.edu/reg-stats>

<sup>5</sup> Susan Dudley & Melinda Warren, REGULATORS’ BUDGET INCREASES CONSISTENT WITH GROWTH IN FISCAL BUDGET: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2015 AND 2016. The George Washington University Regulatory Studies Center and the Weidenbaum Center on the Economy, Government, and Public Policy. (2015) available at <http://regulatorystudies.columbian.gwu.edu/2016-regulators-budget-increases-consistent-growth-fiscal-budget>. Note that “agencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report,” so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc.

<sup>6</sup> Office of the Federal Register. FEDERAL REGISTER PAGES PUBLISHED 1936 – 2013 (2014) available at: <https://www.federalregister.gov/learn/tutorials>

<sup>7</sup> Office of the Federal Register. CODE OF FEDERAL REGULATIONS, PAGE BREAKDOWN - 1975 THROUGH 2014. (2015) available at: <https://www.federalregister.gov/learn/tutorials>

<sup>8</sup> William J. Clinton. E.O. 12866. *Regulatory Planning and Review*, FEDERAL REGISTER, Vol. 58, No. 190. (1993) Available at: [http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf)

<sup>9</sup> E.O. 12866, Sec. 1(a)

### Applying Fiscal Budget Concepts to Regulation

Despite these requirements for public input and regulatory impact analysis, however, the growth in new regulations continues, and with it concerns that we have reached a point of diminishing returns. The application of fiscal budgeting concepts to regulation holds the potential to bring more accountability and transparency to the regulatory process.

The regulatory budget is premised on the view that the transfer of private resources by regulation is no less a cost imposed by government than the collection and expenditure of private resources through the tax and spending powers. But while government expenditures are constrained by the ability to tax and borrow, regulatory costs are subject to no built-in limitations. By creating a systematic limitation on regulatory costs, a regulatory budget would counteract the tendency by agencies to treat private resources as a “free good.”<sup>10</sup>

The idea of a “regulatory budget” is not new.<sup>11</sup> In 1980, President Carter’s *Economic Report of the President* discussed proposals “to develop a ‘regulatory budget,’ similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits.” The Report noted analytical problems with developing a regulatory budget, but concluded that “tools like the regulatory budget may have to be developed” if governments are to “recognize that regulation to meet social goals competes for scarce resources with other national objectives,” and set priorities to achieve the “greatest social benefits.”<sup>12</sup>

According to Christopher DeMuth, writing in 1980:

The regulatory budget would operate by close analogy to the conventional fiscal process. Each year (or at some longer interval), the federal government would establish an upper limit on the costs of its regulatory activities to the economy and would apportion this sum among the individual regulatory agencies. This would presumably involve a budget proposal developed by OMB in negotiation with the regulatory agencies, approved by the President, and submitted to Congress for review, revision, and passage. Once the President had signed the final budget appropriations into law, each agency would be obliged to live within its

<sup>10</sup> Jeffrey A. Rosen and Brian Callanan, “The Regulatory Budget Revisited,” *ADMINISTRATIVE LAW REVIEW*, Vol. 66, No. 4, 839. (2014)

<sup>11</sup> Rosen & Callanan, 2014, provide a concise review of previous research and efforts. 848-853.

<sup>12</sup> Chairman of the Council of Econ. Advisers, 1980 *ECONOMIC REPORT OF THE PRESIDENT*, 125. (1980), available at [http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569\\_ERP.pdf](http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf).

regulatory budget for the time period in question. The budget would cover the total costs of all regulations past and present, not just new ones.<sup>13</sup>

### Advantages of a regulatory budget

By making more transparent the private sector resources needed to achieve regulatory objectives, a regulatory budget would encourage policy officials in the legislative and executive branches, as well as the public, to consider regulatory priorities and tradeoffs. This transparency would also strengthen political accountability and discipline. Expected benefits would be considered up front (when issuing legislation or new regulations), and elected officials would have to consider how much achieving particular goals are worth.

A pure regulatory budget would require an explicit consideration of the aggregate economic costs of regulation. This transparency would “afford policymakers and the public a more complete picture of the economic footprint of regulation.”<sup>14</sup>

Resources would likely be better allocated because policy makers would have incentives to find the most cost-effective ways of achieving policy goals, not only among alternative forms of regulation, but among different vehicles for addressing a problem. It might reduce “the increasing tendency of government to pursue its objectives through regulation rather than taxing and spending—even when regulation is otherwise less desirable—*because* regulation is less constrained.”<sup>15</sup>

By constraining the private sector resources that can be committed to achieving regulatory mandates, a regulatory budget could impose internal discipline on regulatory agencies, perhaps lessening the need for case-by-case oversight. By focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs, it might remove some of the contentiousness surrounding benefit-cost analysis and presidential oversight.<sup>16</sup> “Faced with a budget constraint, the agencies would measure the costs and benefits of individual regulatory proposals in order to further their own organizational interests rather than to satisfy the minimum requirements of an executive order or judicial review.”<sup>17</sup>

A regulatory budget constraint would also encourage evaluation of existing rules’ costs and effects. Despite broad support, initiatives to require ex post evaluation of regulations have met

<sup>13</sup> Christopher C. DeMuth, *The Regulatory Budget*, REGULATION MAGAZINE, Mar.–Apr. 1980, 31.

<sup>14</sup> Rosen & Callanan, 842.

<sup>15</sup> DeMuth, 38.

<sup>16</sup> Susan Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, CASE WESTERN RESERVE LAW REVIEW, Vol. 65, Issue 4, 1050. (2015)

<sup>17</sup> DeMuth, 36.

with limited success<sup>18</sup> largely because they did not change underlying incentives. If the issuance of new regulations was contingent on finding a regulatory offset, agencies would have incentives to evaluate both the costs and effectiveness of existing programs.<sup>19</sup>

### Analytical issues with a regulatory budget

While a regulatory budget holds considerable appeal for making regulatory policy more transparent, accountable, and cost-effective, the analytical problems associated with it are non-trivial. The task of gathering and analyzing information on the costs of all existing regulations in order to establish a baseline budget would be enormous, and the resulting numbers not very reliable. Even defining what should be considered “costs” will be challenging. Estimating the opportunity costs of regulations is not as straightforward as estimating fiscal budget outlays, where past outlays are known and future outlays can generally be predicted with some accuracy. Since the late 1990s, OMB has been compiling agency estimates of the costs (and benefits) of major regulations with mixed results.<sup>20</sup>

An incremental approach, such as a “regulatory PAYGO,”<sup>21</sup> would avoid some of these difficulties while retaining many of the benefits of a regulatory budget. Under a regulatory PAYGO or “one-in-one-out” approach, regulatory agencies would be required to eliminate an outdated or duplicative regulation before issuing a new regulation of the same approximate economic impact. Unlike a regulatory budget, agencies would only have to estimate costs for regulations being introduced (which they should already do) and offsetting regulations they propose to remove. Nevertheless, deciding what “costs” to include in estimating budgets or offsets will necessarily be a matter of judgment. Understanding the full social costs of regulation is difficult, if not impossible.

Some regulatory impacts will be harder to estimate than others. What are the costs associated with homeland security measures that reduce airline travelers’ privacy? What are the costs of regulations that prevent a promising, but yet unknown, product from reaching consumers? Even regulations whose costs appear to be straightforward, such as corporate average fuel economy standards that restrict the fleet of vehicles produced, depend on assumptions about consumer preferences and behaviors that may not reflect American diversity. The Environmental

<sup>18</sup> Susan E. Dudley prepared statement before the Senate Homeland Security and Government Affairs Committee, July 2011, available at: [http://www.tsppa.gwu.edu/docs/20110720\\_testimony\\_dudley.pdf](http://www.tsppa.gwu.edu/docs/20110720_testimony_dudley.pdf)

<sup>19</sup> Senator Mark Warner, prepared statement at *Federal Regulation: A Review of Legislative Proposals, Part I*. June 23, 2011, available at <http://www.hsgac.senate.gov/download/2011-06-23-warner-testimony>

<sup>20</sup> Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation*, 47 J. BUSINESS ECONOMICS. (2012)

<sup>21</sup> See statements of Senator Mark Warner and Senator Rob Portman at a Homeland Security and Government Affairs Committee hearing on June 23, 2011, available at <http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i>.

Protection Agency and Department of Transportation estimate that these rules will have large negative costs (even if benefits were zero), because, according to their calculations, the fuel savings consumers will derive from driving more fuel-efficient vehicles will outweigh the increased purchase price.<sup>22</sup> Are such estimates are credible,<sup>23</sup> and how should negative costs be treated under a regulatory budget?

According to DeMuth:

Clearly, a workable budgeting system would have to rest on a practical compromise – some measure of “expenditures by firms, consumers, and third parties” that was narrow enough to facilitate general agreement in particular cases but not so narrow as to stimulate massive cost substitution strategies by the agencies.<sup>24</sup>

How a budget or an offset requirement would affect agencies’ incentives for estimating costs is uncertain. In developing a baseline estimate of the costs of existing regulations, they may have incentives to overstate costs, particularly for regulations they may want to trade in exchange for new initiatives. In considering regulatory offsets, should ex ante estimates of costs be used, or ex post?

Congress would probably need to establish regulatory burden baselines in new authorizing legislation. Providing an entity outside of the executive branch (such as CBO or GAO) the resources and mandate to (1) estimate the regulatory costs associated with executing new legislation, and (2) evaluate and critique agency estimates of regulatory costs could be critical to the success of a regulatory budget or PAYGO.<sup>25</sup>

## Conclusion

Despite the analytical difficulties, a form of a regulatory budget has the potential to impose some needed discipline on regulatory agencies, generate a constructive debate on the real impacts of regulations, and ultimately lead to more cost-effective achievement of public priorities. Other countries, such as the United Kingdom,<sup>26</sup> Canada,<sup>27</sup> the Netherlands,<sup>28</sup> Australia<sup>29</sup> and

<sup>22</sup> According to EPA & DOT, under the recently proposed standards for heavy-duty trucks, “the buyer of a new long-haul truck in 2027 would recoup the investment in fuel-efficient technology in less than two years through fuel savings.” Press Release: EPA, DOT PROPOSE GREENHOUSE GAS AND FUEL EFFICIENCY STANDARDS FOR HEAVY-DUTY TRUCKS. June 19, 2015.

<sup>23</sup> For a discussion of this question, see Brian F. Mannix and Susan E. Dudley, *The Limits of Irrationality as a Rationale for Regulation and Please Don't Regulate my Internalities*, J. POLICY ANALYSIS & MANAGEMENT. 34:3. Summer 2015.

<sup>24</sup> DeMuth, 39.

<sup>25</sup> Dudley HSGAC 2011 testimony.

<sup>26</sup> <https://www.gov.uk/government/collections/one-in-two-out-statement-of-new-regulation>

Portugal,<sup>30</sup> have addressed these issues and initiated programs that require new regulatory costs to be offset by removal of existing regulatory burdens.

While it will never be possible to estimate the real social costs of regulations with any precision, a regulatory budget or a more modest regulatory PAYGO should provide incentives for agencies, affected parties, academics, Congressional entities and non-governmental organizations to improve upon the rigor of regulatory impact estimates.

As President Carter's Economic Report of the President concluded in 1980:

The Nation must recognize that regulation to meet social goals competes for scarce resources with other national objectives. Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached.<sup>31</sup>

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<sup>27</sup> <https://www.tbs-sct.gc.ca/rtrap-parfa/0129bg-fi-eng.asp>

<sup>28</sup> <http://www.government.nl/issues/reducing-the-regulatory-burden/regulatory-burden-on-businesses>

<sup>29</sup> [https://cuttingredtape.gov.au/sites/default/files/documents/australian\\_government\\_guide\\_regulation.pdf](https://cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf)

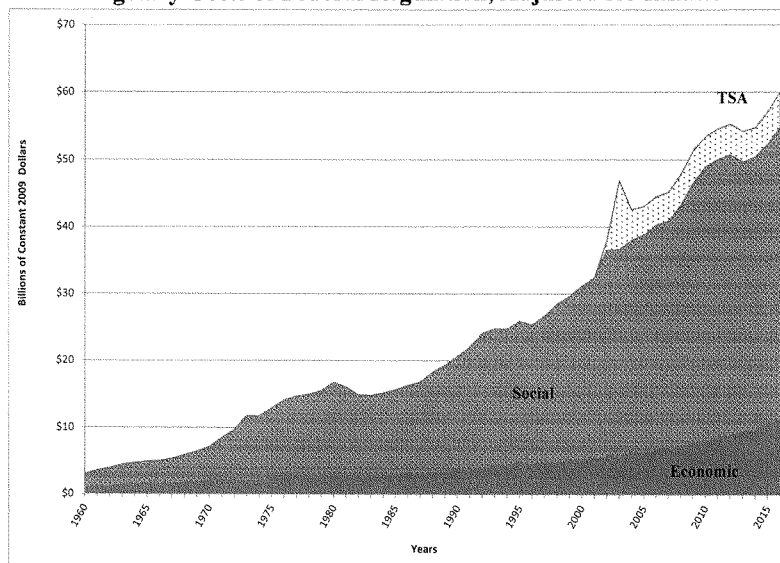
<sup>30</sup> European Commission, Group of High Level National Regulatory Experts (HLG-BR), Meeting of 6 May 2014. [http://ec.europa.eu/smart-regulation/impact/docs/final\\_minutes\\_hlgbr\\_6\\_may\\_2014.pdf](http://ec.europa.eu/smart-regulation/impact/docs/final_minutes_hlgbr_6_may_2014.pdf).

<sup>31</sup> 1980 Economic Report of the President, 126.

### Attachment: Measures of Regulatory Activity

Unlike the fiscal budget, which tracks direct spending supported by taxes, there is no mechanism for keeping track of the off-budget spending generated through regulation. Thus, efforts to track regulatory activity over time often depend on proxies, such as the size of the budgets and staffing of regulatory agencies (Figures 1 and 2), the number of new regulations issued (Figure 3), the number of pages printed in the *Federal Register* (Figure 4), or the pages of federal regulatory code (Figure 5).

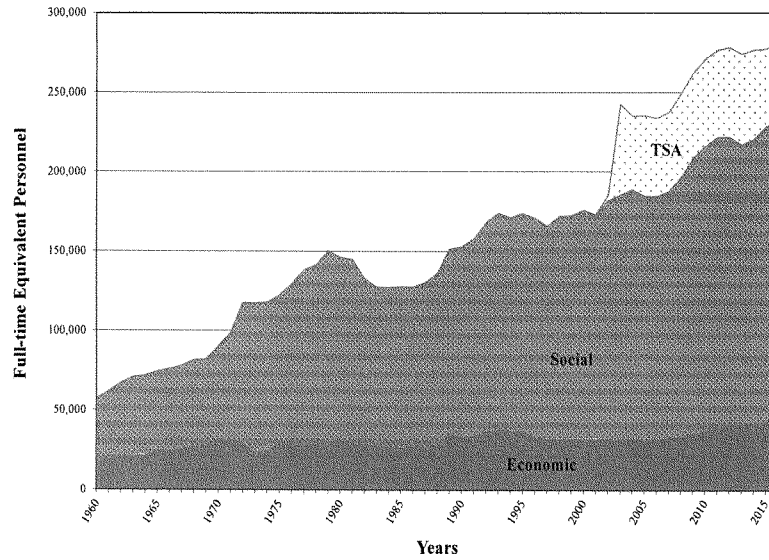
**Figure 1**  
**Budgetary Costs of Federal Regulation, Adjusted for Inflation**



Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.



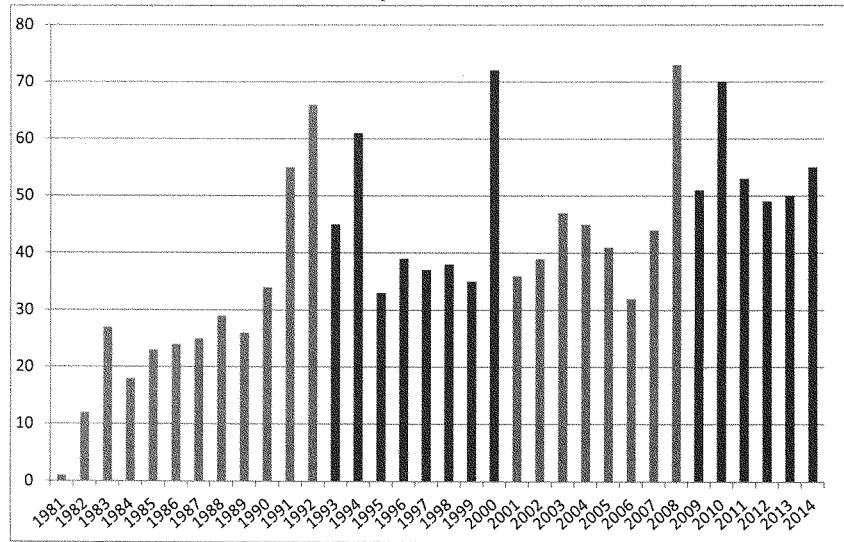
**Figure 2**  
**Staffing of Federal Regulatory Agencies**



Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

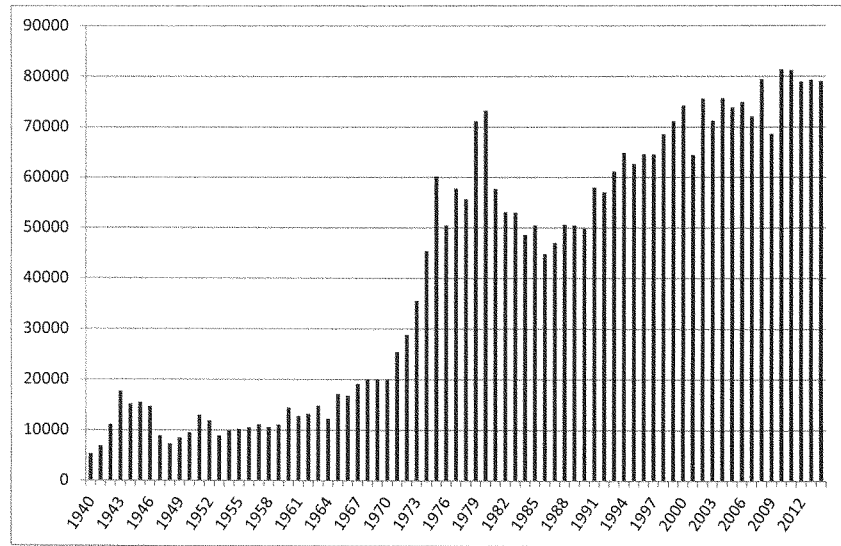
Figure 3

**Number of Final Economically Significant Rules  
Published by “Presidential Year”**



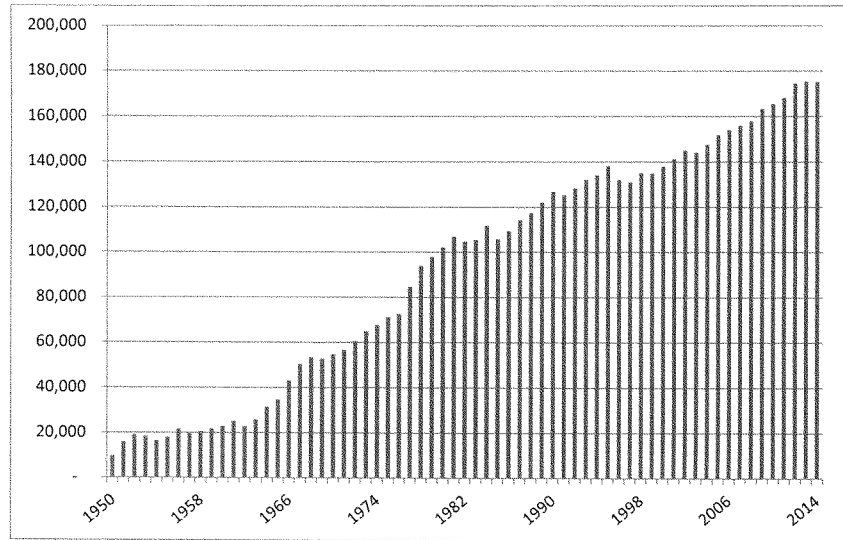
Source: RegInfo.gov: Number of economically significant regulations published between February 1 and January 30.

**Figure 4**  
**Federal Register Pages**



Source: <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.xls>

**Figure 5**  
**Code of Federal Regulation Pages**



Source: <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.xls><sup>32</sup>

<sup>32</sup> RegData.org, a product of the Mercatus Center at George Mason University, provides more detailed information on regulatory requirements in the Code of Federal Regulations, including the number of “restrictions” by section.

**TESTIMONY OF RICHARD J. PIERCE, JR.  
LYLE T. ALVERSON PROFESSOR OF LAW  
THE GEORGE WASHINGTON UNIVERSITY**

**IN A HEARING ON ACCOUNTING FOR THE TRUE COST OF REGULATION:  
EXPLORING THE POSSIBILITY OF A REGULATORY BUDGET  
BEFORE THE SENATE COMMITTEE ON THE BUDGET AND THE SENATE  
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
JUNE 23, 2015**

Thank you, Chairmen Johnson and Enzi, Ranking Members Carper and Sanders, and distinguished Members of the Senate Committees on the Budget and on Homeland Security and Governmental Affairs, for the opportunity to testify today on The True Cost of Regulation: Exploring the Possibility of a Regulatory Budget.

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at the George Washington University School of Law and a member of the Administrative Conference of the United States. For 38 years my teaching, research, and scholarly writing has focused on administrative law and government regulation. I have written 125 articles and 20 books on those subjects. My books and articles have been cited in scores of judicial opinions, including over a dozen opinions of the United States Supreme Court.

I strongly support the idea of a regulatory budget, but it needs to be carefully designed and implemented. As I will explain later in my testimony, we already have the functional equivalent of a regulatory budget in the form of Executive Orders issued by Presidents of both parties that are implemented by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). That regulatory budget is well-designed and well-implemented.

There are versions of a regulatory budget that would harm the nation. One version of a regulatory budget that would harm the nation is a regulatory budget that would limit the total cost of the rules that an agency can impose on the firms that it regulates. The other version that would harm the nation would require an agency to rescind an existing rule that imposes costs equal or greater to the cost of a proposed new rule at or before the time that it issues the new rule.

Those two forms of a regulatory budget share a common flaw. They establish a budget based solely on the cost of a rule and ignore the benefits of a rule. I share the views that President Reagan expressed when he issued Executive Order 12,291. That Executive Order required each Executive Branch agency to use cost-benefit-analysis (cba) to evaluate each rule the agency proposes to issue and to issue only those rules that will yield estimated benefits that exceed the estimated costs of the rule unless a statute forbids the agency to use cba in deciding whether to issue a rule. President Reagan's Executive Order also gave OIRA responsibility to review the cbas provided by each agency and to take such actions as are needed to ensure that each agency complies with the Executive Order.

Every President since President Reagan has issued Executive Orders that reflect President Reagan's view that the cost of a rule alone is not an appropriate criterion to use in deciding whether the agency should issue the rule, and that the appropriate criterion is the net benefits of a rule to society. Those net benefits can only be estimated by subtracting the estimated cost of a rule from the estimated benefits of the rule. The

benefits include lives saved, injuries and illnesses avoided, and reductions in property damage. Any version of a regulatory budget that does not take account of the benefits of rules will cause avoidable losses of life, injuries, illnesses, and property damage.

The importance of considering both the benefits and the costs of a proposed rule is illustrated by OIRA's estimates of the aggregate costs and benefits of all of the rules reviewed by OIRA during the ten-year period between October 1, 2003 and September 30, 2013. OIRA estimated that the costs were between 57 and 84 billion dollars. That seems like a large regulatory cost until you compare it with OIRA's estimate of the benefits of the rules. OIRA estimated the aggregate benefits as between 217 billion and 863 billion dollars. If you apply the principles urged by most economists and adopted by Presidents Reagan, Bush, Clinton, Bush, and Obama, the net benefit of the rules to society is between 133 and 806 billion dollars.

More recently, Presidents Clinton, Bush, and Obama have reinforced the principles underlying CBA by issuing Executive Orders that require Executive Branch agencies to review all of their existing rules, to identify those rules that impose costs that exceed the benefits they confer on society, and to begin the process of rescinding any rule that produces costs that exceed its benefits except where a statute prohibits an agency from taking that action. Those Executive Orders are an excellent complement to the Executive Orders that forbid an agency from issuing a new rule unless its benefits exceed its costs. They are expected to save 20 billion dollars and to eliminate over 100 million hours of paperwork.

When you combine the effects of the Executive Orders that forbid an agency from issuing a rule with costs that exceed its benefits to society with the effects of the Executive Orders that require agencies to identify and to rescind any existing rule with costs that exceed its social benefits, you get a regulatory budget that maximizes the net social benefits created by rules issued by federal agencies by ensuring that the aggregate social benefits of those rules exceed the aggregate costs of those rules. That is a sensible version of a regulatory budget. Any version of a regulatory budget that considers only the cost of rules and ignores the benefits of rules will reduce social welfare by costing society loss of lives, increased injuries and illnesses, and damage to property.

Thank you again for the opportunity to testify today. I look forward to your questions.



**Post-Hearing Questions for the Record  
Submitted to the Honorable Tony Clement  
From Senator Michael B. Enzi  
"Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory  
Budget"  
June 23, 2015**

**Q1. You ran a small business, as I did, and have experienced first-hand the unique burdens that regulations pose for business owners. Given your unique perspective as a small business owner, can you explain how the "one for one" law enables the small business owner in Canada to run and grow their business? How did you build public support for this concept?**

**A1.** The One-for-One Rule supports small businesses in Canada by placing strict controls on the growth of federal regulatory red tape imposed on business. It requires regulators to offset any administrative burden cost increases from new regulatory changes with equal reductions from existing regulations. Under the One-for-One Rule, for every new regulation added that imposes an administrative burden on business, one must be removed.

The One-for-One Rule was implemented on the recommendation of the Red Tape Reduction Commission, which was composed of Members of Parliament and business representatives. In 2011, the Commission consulted Canadian businesses and individuals through an online consultation process and by hosting a series of roundtables across Canada in order to identify irritants to business stemming from federal regulatory requirements and to recommend options that address the irritants on a long-term basis, while ensuring that the environment and the health and safety of Canadians are not compromised in the process.

The Commission received approximately 2,300 submissions from Canadian businesses, mostly small businesses. These submissions made it clear that red tape in the regulatory system had been growing uncontrolled and needed to be stopped. Businesses have been supportive of the One-for-One Rule since its implementation in April 2012 and throughout the process to enshrine the Rule in law.

**Post-Hearing Questions for the Record**  
**Submitted to the Honorable Tony Clement**  
**From Senator Joni Ernst**  
**"Accounting for the True Cost of Regulation: Exploring the Possibility of a**  
**Regulatory Budget"**  
**June 23, 2015**

**Q1. What are some of the specific challenges you encountered in implementing your one-in-one-out approach?**

**A1.** The One-for-One Rule represented a culture shift for regulators and as with any new initiative it takes time to learn and build awareness. Over time, the Rule has resulted in positive culture changes within regulatory departments with regulators becoming more sensitive to the administrative burden that regulations can impose on business. This was reported by departmental officials who appeared before the Parliamentary committee reviewing the legislation for the One-for-One Rule. Some of the changes seen from regulators include reducing reporting requirements, moving to electronic reporting, cutting back on the frequency of reporting, and raising thresholds for having to submit reports.

**Q2. Can you provide specifics on how your group quantified or benchmarked the cost savings from your one-in-one-out approach across businesses and industries?**

**A2.** The Standard Cost Model (SCM) is the basis for calculating administrative burden under the One-for-One Rule. The SCM is an internationally accepted way to estimate the administrative burden costs to business resulting from information and reporting obligations included in a regulation, such as submitting an application to government, reporting, or preparing for a government inspection.

Under the Rule, the formula for calculating the administrative burden cost of a regulation is based on the annualized cost of each administrative activity totalled over the first 10 years after the regulation is registered (cost = employee time × cost of labour (including overhead) × number of businesses). The formula also applies a discount rate to costs occurring in the future, discounts estimates to constant 2012 Canadian dollars, and converts the results into annualized estimates so that estimated administrative burden costs can be reconciled over time as they are added to or removed from existing regulations.

In addition, regulators must consult with stakeholders as they develop their cost estimates and publish their estimates and assumptions in the Regulatory Impact Analysis Statement for the proposed regulations, which gives business an additional opportunity to provide feedback before regulations are finalized.

Throughout this process, the Treasury Board Secretariat provides a challenge function on regulators to ensure robust analysis.

**Post-Hearing Questions for the Record**  
**Submitted to the Honorable Tony Clement**  
**From Senator Thomas R. Carper**  
**"Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget"**  
**June 23, 2015**

**Q1. One of my concerns with implementing a regulatory budget is that it could cause a much needed regulation to be delayed because the agency cannot identify a suitable offset to repeal. I understand the law enacted in Canada provides flexibility that might alleviate this concern. Can you please explain how that works?**

**A1.** The One-for-One Rule will not compromise the health and safety of Canadians. Ministers can bring forward important proposals and continue to have all options on the table as they act in the public interest. It is important to note that the Rule does not apply to compliance burden, just administrative burdens. Experience has shown to date that new burden can be added where it is required and can be taken out without affecting compliance standards.

The One-for-One Rule contains two important features that allow departments and agencies the flexibility to comply without delaying the introduction of important regulations. The first is that departments have 24 months, after a regulation imposing a new administrative burden is registered, to comply with the requirements of the "One-for-One" Rule. The second is that regulators who have a "balance" of reductions in administrative burden costs and/or regulatory repeals published since the April 2012 introduction of the rule can use these existing reductions/repeals to satisfy requirements under the rule. This second feature also serves as an incentive to reduce administrative burden costs on business as soon as possible (rather than waiting until the regulator needs to introduce a new regulation).

The *Red Tape Reduction Act* also has a public transparency element. Stakeholders, including the general public, and Parliamentarians can see how the Rule is applied to regulatory proposals in the *Canada Gazette*, which is the official newspaper of the Government of Canada and is used to publish new statutes and regulations, proposed regulations, decisions of administrative boards and an assortment of government notices. In addition, the *Red Tape Reduction Act* also provides the Treasury Board the authority to exempt regulations from the One-for-One Rule if needed.

**Q2. Another concern I have raised with the idea of a regulatory budget is that it further politicizes the regulatory process and could be used by an administration to repeal controversial regulations that others believe are very necessary. I understand the law enacted in Canada allows certain types of regulations to be exempted from these requirements and does not allow them to be repealed. Can you discuss which types of regulations are off limits and why?**

**A2.** Under the proposed regulations published in *Canada Gazette*, Part I on June 27, 2015, the Treasury Board may exempt regulations from the One-for-One Rule under the following categories or circumstances:

1. If the regulation is related to tax or tax administration.

2. If Her Majesty the Queen in Right of Canada has no discretion regarding the requirements that must be included in the regulation due to international or legal obligations, including the imposition of international sanctions or the implementation of Supreme Court of Canada decisions.
3. In emergency, unique or exceptional circumstances, including where compliance with the Rule would compromise public health, public safety or the Canadian economy.

Tax and tax administration regulations are exempted from the Rule because of their unique nature and the shared responsibility between the executive and Parliament. Each of these exemptions allows the government to control the administrative burden on business from regulations without impeding other public policy objectives. The exemptions act as a safeguard to ensure that the One-for-One Rule will not compromise public health, public safety or the Canadian economy in situations where compliance with the Rule may otherwise create a potential risk.

**Q3. The process for issuing a new regulation is quite rigorous and requires significant analysis. But many times it seems that proposals to repeal regulations do so without subjecting them to that same rigorous analysis. What type of analysis is required by your agencies to show that a regulation should be modified or repealed and how do you ensure that no regulations that are still necessary are repealed?**

**A3.** In Canada, all regulatory proposals, whether introducing a new regulation or repealing an existing regulation, must follow the same rigorous process set out in the Government of Canada's regulatory policy, the *Cabinet Directive on Regulatory Management* (CDRM). The CDRM prescribes a life cycle approach to regulating and requires that all regulatory proposals undergo regulatory impact analysis to assess the expected impact of the regulatory initiative.

Federal departments and agencies must consult with affected parties and stakeholders during the regulatory process. A summary of the regulatory impact analysis, along with the regulatory proposal, must also be published in the *Canada Gazette* for a public comment period before the regulatory proposal can be finalized.

It is also important to note that the One-for-One Rule does not capture compliance burden, just administrative burden. Experience has shown to date that new burden can be added where it is required and can be taken out without affecting compliance standards.

**Q4. The regulatory process is already quite complicated and time consuming – which, of course, leads to the need for significant resources. It seems to me that the additional information necessary to implement a regulatory budget would be significant – and therefore also the resources to collect and analyze all of that information would be significant too. Could you please discuss how this law has impacted the budgets and other resources needed by the regulatory agencies and those who review proposed and existing regulations in Canada?**

**A4.** The One-for-One Rule requires regulators to be accountable for their decisions about the introduction of new administrative burden on business, such as new forms and reports. Under the Rule, regulators must identify and calculate the costs of administrative burden in a consistent and transparent

fashion. They are required, among other things, to consult with stakeholders about their cost estimates and to disclose their assumptions.

After three years in place, the One-for-One Rule has become a regular part of the regulatory system and is incorporated into the regulatory impact analysis that departments and agencies have always been required to perform when developing regulatory proposals. This regulatory impact analysis, prior to the introduction of the Rule, had already required regulators to report information based on cost-benefit analysis results, of which administrative burden costs and savings are a sub-component. Through an earlier Cabinet directive, the *Cabinet Directive on Streamlining Regulations* (CDSR), departments and agencies were also already expected to limit the cumulative administrative burden and impose the least possible cost on Canadians and businesses that is necessary to achieve the intended policy objectives.

**Post-Hearing Questions for the Record**  
**Submitted to the Honorable Tony Clement**  
**From Senator Claire McCaskill**  
**"Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget"**  
**June 23, 2015**

**Q1. The one-in-one-out rule in the *Red Tape Reduction Act* establishes a permanent ceiling on regulatory burdens in Canada. What evidence did Canada use to determine that the overall regulatory burden at the time of implementation of the rule was the appropriate amount for this ceiling?**

**A1.** The government created a Red Tape Reduction Commission in 2011, composed of Members of Parliament and business representatives that consulted Canadian businesses and individuals through an online consultation process and by hosting a series of roundtables across Canada in order to identify irritants to business stemming from federal regulatory requirements. The Commission received approximately 2,300 submissions from Canadian businesses, mostly small businesses. These submissions indicated that a control on the growth of administrative burden from regulations was needed.

The One-for-One Rule places a strict control on the growth of regulatory red tape and ensures that regulators think hard about whether they really do need all of the information they are asking for, before they add more administrative costs on business. The Rule does not establish a ceiling on regulatory burden. Rather, it acts as a control on the growth of unnecessary burden while allowing the government to take regulatory action when necessary by granting exemptions to the Rule.

The One-for-One rule was also implemented as a policy for over three years before the decision was made to make it legislation. The overall experience during this time period was that departments were able to deliver significant savings to businesses through reductions in administrative burden costs without compromising the health and safety of Canadians.

**Q2. Estimates of the costs of regulations can be inaccurate. How often are costs estimated at the time regulations are issued higher than the actual costs of the regulation once implemented? What are some examples of overestimated costs for regulations? Does the *Red Tape Reduction Act* account for discrepancies between actual costs and estimated costs? If so, how does it correct for the discrepancies?**

**A2.** Regulators must consult with stakeholders as they develop their cost estimates. In developing these estimates, regulators must follow the internationally-recognized method of costing administrative burden known as the Standard Cost Model. Regulators must also publish their cost estimates and assumptions in the summary of their regulatory impact analysis for the proposed regulations, which gives business an additional opportunity to provide feedback before regulations are finalized. Based on stakeholder feedback, regulators are expected to refine their cost estimates before seeking final approval of their regulatory proposals.

Throughout this process, the Treasury Board Secretariat provides a challenge function on regulators to ensure robust analysis. Implementation of the One-for-One Rule is also set to be reviewed as part of a 5 year review of the *Red Tape Reduction Act*.

## Regulatory Studies Center

THE GEORGE WASHINGTON UNIVERSITY

Susan E. Dudley response to Senator Enzi

Follow-up from Senate testimony on Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget, June 23, 2015

**Senator Enzi, Q1:** *You have testified that Congress needs its own staff dedicated to reviewing regulatory legislation and regulations, particularly if it enacts some form of regulatory pay-as-you-go or the Canadian “one for one” legislation. Could you please elaborate on your position, specifically focused on those analytical operations that have been instituted by other governments to assure adequate review of regulations, and how that could be adapted for Congress?*

**Dudley, A1:** Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient for ensuring regulations are accountable to the public and their elected representatives. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. Such an office would serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.<sup>1</sup> Regulatory expertise in Congress may be particularly important during presidential transitions, when regulatory activity tends to increase.<sup>2</sup>

While parliamentary systems rely on different mechanisms for accountability than does the US (where Congress and the courts provide checks and balances on the executive, and vice versa), the experience of countries that have instituted successful regulatory offset programs is informative. Particularly relevant with respect to your question, Senator, the Netherlands, the UK and Canada all provided a third party—separate from the regulator—with responsibility for ensuring program objectives were met.<sup>3</sup>

According to the World Bank, a key factor in the success of the Netherlands’ program to reduce regulatory costs was “the establishment of ACTAL (the Dutch Advisory Board on Administrative Burden) as an independent watchdog of the reforms.”<sup>4</sup> The independent ACTAL

<sup>1</sup> Susan E. Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,” forthcoming in 65 *Case Western Reserve Law Review* (2015)

<sup>2</sup> Susan E. Dudley, “Observations on OIRA’s Thirteenth Anniversary,” 63 *Administrative Law Review* 113 (2011) <http://heinonline.org/HOL/Page?handle=hein.journals/admin63&id=1093>.

<sup>3</sup> Ana Maria Zarate Moreno, *Regulatory Pay as you Go: Lessons from Other Countries*. The George Washington University Regulatory Studies Center, Regulatory Policy Commentary. July 15, 2015. <http://regulatorystudies.columbian.gwu.edu/regulatory-pay-you-go-lessons-other-countries>

<sup>4</sup> World Bank. “Review of the Dutch Administrative Burden Reduction Programme.” 2007. <http://www.doingbusiness.org/reports/thematic-reports/review-of-the-dutch-administrative-burden-reduction-programme>



advises the Government and the Parliament on reducing regulatory burdens.<sup>5</sup> The Better Regulation Executive in the UK and the Treasury Board in Canada perform similar functions overseeing their one-in-two-out and one-for-one policies, respectively.<sup>6</sup>

*Senator Enzi, Q2: You previously served as Administrator of the Office of Information of Regulatory Affairs and in that position oversaw regulatory impact analysis performed on major regulations impacting the economy. My experience is that compliance costs burden businesses immediately, but the social benefits ascribed to the regulation come over time. In evaluating benefit cost analyses, does OIRA take this into consideration? Does OIRA, for example, weigh the costs of the regulations more heavily in the near term to make up for the lack of certainty of benefits over the long term?*

**Dudley, A2:** In general, the costs of regulation are more immediate, tangible, and quantifiable than the benefits, yet agencies' regulatory impact analyses tend to conclude that benefits far exceed costs. There are several reasons to be skeptical of some of these benefits claims: a) the use of unrealistically low discount rates, b) assumptions used to take account of uncertainty, and c) unbalanced treatment of benefits and costs.

- a) **Unrealistically low discount rates.** Discounting future streams of benefits and costs to present value terms attempts to adjust for the different time periods in which they accrue, however, the use of low discount rates that do not reflect individuals' actual time preferences can bias regulatory decisions in favor of more intervention. For example, the Departments of Energy and Transportation, and the Environmental Protection Agency calculate large net benefits from consumer cost savings associated with appliance efficiency and fuel economy standards. The regulated products cost consumers more up front, but are expected to reduce energy or fuel bills over time. To reflect the fact that benefits will be spread out over many years, the agencies use rates of 3% and 7% to compare those savings to upfront costs. However, these rates are much lower than the discount rates that consumers actually use when comparing upfront costs to long-term benefits. For instance, a growing body of literature finds that median consumer discount rates for appliance purchases are closer to 18% or 25%, or even higher.<sup>7</sup> Using discount rates that actually reflect consumers' time preferences results in *net costs* instead of benefits, especially for median- and low-income consumers.<sup>8</sup>

<sup>5</sup> <http://www.actal.nl/english/about-actal/>

<sup>6</sup> Susan E. Dudley, "Can Fiscal Budget Concepts Improve Regulation?" The George Washington University Regulatory Studies Center, Working Paper. July 2015.  
[https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/SDudley\\_Can-Fiscal-Budget-Concepts-Improve-Regulation2015\\_0.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/SDudley_Can-Fiscal-Budget-Concepts-Improve-Regulation2015_0.pdf)

<sup>7</sup> See Sofie E. Miller 2015 for a review of this literature: "One Discount Rate Fits All? The Regressive Effects of DOE's Energy Efficiency Rule." *Policy Perspectives* 22: 40-54.

<sup>8</sup> Miller, 2015.





The government uses an even lower discount rate to estimate the distant benefits of reducing carbon emissions. These very low rates tend not to be grounded in empirical observations of consumer preferences, but rather in a prescriptive notion of what consumers *ought* to want.<sup>9</sup> As one early participant in the government decision process observed, “the prescriptive approach reflects the normative judgments of the decisionmaker.”<sup>10</sup>

- b) **Assumptions under uncertainty.** Assessments of the risks posed under different conditions and of the potential changes in risk achievable from different policy options depend not only on pure scientific inputs, but on scientific assumptions and judgments. Scientists will never have complete information to predict outcomes with absolute certainty, so risk assessments embody assumptions and rules of thumb in estimating risk reduction benefits. Policymakers and the public are often unaware of the influence of these science policy choices or the existence of alternative, scientifically plausible, alternative assessments. Instead, assessments often generate precise-sounding predictions that hide considerable uncertainty about the actual risk. Thus policy decisions that are thought to be based on science are heavily influenced by hidden judgments about how to deal with uncertainty.<sup>11</sup>

For example, the majority of the benefits reported from all U.S. regulation derive from the handful of regulations that reduce one air pollutant (PM<sub>2.5</sub>), which EPA predicts will reduce premature mortality.<sup>12</sup> Yet, there is “significant uncertainty” associated with both “the reduction of premature deaths associated with reduction in particulate matter and ... the monetary value of reducing mortality risk.”<sup>13</sup> EPA’s stated approach to these uncertainties is to err on the side of overestimating risks (and thus overestimating benefits).<sup>14</sup>

- c) **Unbalanced treatment of benefits and costs.** Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that

<sup>9</sup> Susan E. Dudley and Brian F. Mannix. “Public Interest Comment on the Interagency Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order No. 12866.” February 16, 2014. [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/OMB\\_2013-0007\\_SCC.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/OMB_2013-0007_SCC.pdf)

<sup>10</sup> Michael Greenstone, “Estimating the Social Cost of Carbon for the United States Government,” Massachusetts Institute of Technology, November 2010, p. 32.

<sup>11</sup> Susan E. Dudley & George M. Gray. “Improving the Use of Science to Inform Environmental Regulation,” in *Institutions and Incentives in Regulatory Science*, Jason Scott Johnston, ed. Lexington Books 2012.

<sup>12</sup> Susan E. Dudley, “The EPA’s Implausible Return on its Fine Particulate Standard,” *Regulation*, Vol. 36, Number 1. <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-14.pdf#page=2> Spring 2013.

<sup>13</sup> U.S. OMB Reports to Congress on the Benefits and Costs of Federal Regulation (various years) [http://www.whitehouse.gov/omb/inforeg\\_regpol\\_reports\\_congress](http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress)

<sup>14</sup> United States Environmental Protection Agency. Office of the Science Advisor. 2004. Risk Assessment Principles and Practices EPA/100/B-04/001, pp. 13-14



exceed costs. In principle, a benefit-cost analysis should be “complete.” It should include all the significant consequences of a policy decision: direct and indirect, intended and unintended, beneficial and harmful. In practice, all such analyses must to some degree fall short of completeness. The problem is that agencies do not appear to be approaching the analysis objectively. On the benefit side of the equation, they quantify or list every conceivable good thing that they can attribute to a decision to issue new regulations, while on the cost side they only consider the most obvious direct and intended costs of complying with the regulation. Thus, in setting stringent utility emissions standards, EPA dismisses risks associated with reduced electric reliability, the competitiveness of the U.S. economy in international trade, or the effect that higher electricity prices will have on the family budget. In establishing new fuel economy standards, EPA, DOT, and DOE use unrealistic assumptions to estimate consumer energy and fuel savings, without considering all the complex factors that go into individual decisions about which car or appliance to buy.<sup>15</sup>

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<sup>15</sup> “OMB’s Reported Benefits of Regulation: Too Good to Be True?,” *Regulation*, Vol. 36, Number 2, Summer 2013.



## Regulatory Studies Center

THE GEORGE WASHINGTON UNIVERSITY

Susan E. Dudley response to Senator Ernst

Follow-up from Senate testimony on Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget, June 23, 2015

**Senator Ernst, Q1:** *In your testimony, you mentioned that the sheer task of gathering and analyzing information on the costs of all existing regulations in order to establish a baseline budget would be enormous. How should an agency measure and consider cumulative burdens of regulation when writing new regulations?*

**Dudley, A1:** As Michael Mandel & Diana Carew of the Progressive Policy Institute observe, “the natural accumulation of federal regulations over time imposes an unintended but significant cost to businesses and to economic growth.” (*Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, Policy Memo, May 2013)

Executive Order 12866 directs each agency to “tailor its regulations to impose the least burden on society, ... taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations.*” (emphasis added)

As part of their ex ante analysis required before issuing new regulations, agencies should explicitly consider the costs of existing regulations in the affected sector. Original estimates of regulatory costs (developed when existing regulations were first issued) could serve as the starting point for measuring current costs. Examination of the actual impacts of existing regulations (both their costs and their benefits) would supplement the ex-ante estimates. Program evaluation techniques, used regularly in the fiscal budget context to examine the costs and effectiveness of on-budget programs, would be applicable for evaluating regulatory outcomes (costs and benefits), and useful for estimating cumulative impacts of existing regulations. Having this information would be invaluable, not only for understanding cumulative burdens, but also for designing more cost-effective regulations going forward.

**Senator Ernst, Q2:** *Similarly, one particular sector or industry often has to be compliant with multiple regulations that stem from a variety of agencies. How can we quantify a cumulative burden for one specific sector?*

**Dudley, A2:** Focusing on the cumulative burden of regulations in a particular sector could be extremely informative, and more manageable than attempting to develop a baseline across all regulations. Proceeding as suggested in response to question one could provide important insights. While the relevant cost is the social cost of opportunities foregone as a result of regulations, focusing on direct compliance costs, at least initially, could be a reasonable proxy in many sectors, such as electric utilities. In some areas, such as pharmaceuticals, however, direct



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compliance costs would be a poor proxy for the true opportunity costs to consumers and patients, and a more robust measure might be needed.

**Senator Ernst, Q3:** *Do you believe agencies complete regulatory impact analysis as intended by Congress?*

**Dudley, A3:** Many authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, and executive branch requirements for regulatory impact analysis only apply “to the extent permitted by law and where applicable.” (E.O. 12866 Sec. 1(a)) This can lead to regulations with questionable benefits that divert scarce resources from more pressing issues.

When they do conduct regulatory impact analysis, agencies have strong incentives to demonstrate that their desired regulations will result in benefits that exceed costs. Regulatory impact analyses are often developed after decisions are made and used to justify rather than inform them.

In principle, a benefit-cost analysis should be “complete.” It should include all the significant consequences of a policy decision: direct and indirect, intended and unintended, beneficial and harmful. In practice, all such analyses must to some degree fall short of completeness. However, I have raised concerns that agencies do not appear to be approaching the problem objectively. On the benefit side of the equation, they quantify or list every conceivable good thing that they can attribute to a decision to issue new regulations, while on the cost side they only consider the most obvious direct and intended costs of complying with the regulation. Thus, in setting stringent utility emissions standards, EPA dismisses risks associated with reduced electric reliability, the competitiveness of the U.S. economy in international trade, or the effect that higher electricity prices will have on the family budget. In establishing new fuel economy standards, the EPA, DOT, and DOE use unrealistic assumptions to estimate consumer energy and fuel savings, without considering all the complex factors that go into individual decisions about which car or appliance to buy. (Dudley, “OMB’s Reported Benefits of Regulation: Too Good to Be True?,” *Regulation*, Vol. 36, Number 2, Summer 2013)



## Regulatory Studies Center

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Susan E. Dudley response to Senator Sanders

Follow-up from Senate testimony on [Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget](#), June 23, 2015

**Senator Sanders:** *Much of today's hearing concerned the costs of regulation. However, as we've seen in recent years, there are massive costs associated with deregulation. The Wall Street crash in 2008 was caused in part by deregulations of the financial sector. The costs associated with the Great Recession that resulted were massive, and we're still paying the price with high unemployment and a huge deficit. Similarly, the Deepwater Horizon oil spill in 2010 – in which an explosion killed 11 people and almost 5 million barrels of oil spilled over an area estimated to be as large as 68,000 square miles – was also caused, in part, by what the Houston Chronicle called “a lax regulatory climate.”*

*With these facts in mind, how would a regulatory budget account for the unforeseen economic and environmental costs of deregulation?*

**Dudley:** A regulatory budget, or offset program (similar to the UK and Canada) would provide incentives for examining the actual impact of existing regulatory practices, including policies that some might call “deregulatory” or “lax.” For example, regulatory restrictions on the financial sector increased between 2001 and 2008 (RegData.org). More systematic evaluation of the effects of those regulatory changes would not only enable agencies to identify regulatory practices that are not effectively achieving desired outcomes, but would help devise more effective regulatory policies going forward.



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## Regulatory Studies Center

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Susan E. Dudley response to Senator Warner

Follow-up from Senate testimony on Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget, June 23, 2015

**Senator Warner:** *For thirty years presidents of both parties have required most federal agencies to analyze the costs and benefits of major new regulations and abide by the other principles designed to filter out excessive red tape, but independent agencies have been exempt. The Independent Agency Cost Benefit Analysis Act would include independent agencies in that process. Should independent agencies be required to participate in this same cost-benefit analysis process as executive agencies, and should there be more extensive or improved standards across the entire federal government?*

**Dudley:** Yes. For years, experts across the political spectrum have urged greater transparency, analytical rigor, and accountability for regulations issued by independent agencies. The Independent Agency Regulatory Analysis Act is a welcome step in that direction.<sup>1</sup>

Because of their historical designation as “independent,” some agencies have been exempt from these common-sense requirements, making their regulations less accountable and well-reasoned than others.<sup>2</sup> This bipartisan bill has support from former OIRA administrators (including me) who served in the past four presidential administrations. We signed a letter expressing the “unanimous ... view that independent regulatory agencies should be held to the same good-government standards as executive agencies, and [that] the Independent Agency Regulatory Analysis Act advances that goal.”<sup>3</sup>

Independent regulatory agencies are considered independent not because their method of regulation differs from executive agencies, but because Congress has limited the president’s power to remove their top officials (either by statute or tradition). Legal advisors to presidents from Ronald Reagan to Barack Obama have concluded that presidents have the constitutional authority to extend analytical and executive oversight requirements to independent agencies’ regulations, but presidents have been reluctant to do so out of deference to Congress. This legislation would remove that hesitation by reaffirming Congress’s agreement that federal regulations, from whatever source, should follow accepted principles of sound decision-making and be accountable to the president.

<sup>1</sup> Susan E. Dudley, “Bill would close loophole on figuring regulations’ impacts.” *The Conversation*. June 19, 2015. <https://theconversation.com/bill-would-close-loophole-on-figuring-regulations-impacts-43504>

<sup>2</sup> See Resources for the Future: <http://www.rff.org/events/pages/can-greater-use-of-economic-analysis-improve-regulatory-policy-at-independent-regulatory-agencies.aspx>

<sup>3</sup> [http://www.portman.senate.gov/public/index.cfm/files/serve?File\\_id=df3e3b7e-5af4-4858-b239-8ac1f95de1cd](http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=df3e3b7e-5af4-4858-b239-8ac1f95de1cd)



Despite the fact that regulations issued by independent regulatory agencies have broad social impacts, the analysis supporting them tends to be less robust because they have not been covered by the regulatory executive orders. The Administrative Conference of the United States recommended in 2013 that independent regulatory agencies adopt more transparent and rigorous regulatory analyses practices for major rules.<sup>4</sup> OIRA observed in its most recent regulatory report to Congress that “the independent agencies still continue to struggle in providing monetized estimates of benefits and costs of regulation.” It finds that

for the purposes of informing the public and obtaining a full accounting, it would be highly desirable to obtain better information on the benefits and costs of the rules issued by independent regulatory agencies. The absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy. Recall that consideration of costs and benefits is a pragmatic instrument for ensuring that regulations will improve social welfare; an absence of information on costs and benefits can lead to inferior decisions.<sup>5</sup>

The data presented in that report indicate that over 40 percent of the rules developed by independent agencies over the last 10 years provided no information on either the costs or the benefits expected from their implementation.

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<sup>4</sup> <https://www.acus.gov/research-projects/benefit-cost-analysis-independent-regulatory-agencies>

<sup>5</sup> [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014\\_cb/2014-cost-benefit-report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf)





Question for the Record  
From Senator Bernard Sanders  
For Prof. Susan Dudley and Prof. Richard Pierce  
“Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget”  
June 23, 2015  
Senate Budget Committee / Senate Homeland Security and Governmental Affairs Committee

Question #1

Much of today’s hearing concerned the costs of regulation. However, as we’ve seen in recent years, there are massive costs associated with deregulation. The Wall Street crash in 2008 was caused in part by deregulation of the financial sector. The costs associated with the Great Recession that resulted were massive, and we’re still paying the price with high unemployment and a huge deficit. Similarly, the Deepwater Horizon oil spill in 2010 – in which an explosion killed 11 people and almost 5 million barrels of oil spilled over an area estimated to be as large as 68,000 square miles – was also caused, in part, by what the Houston Chronicle called “a lax regulatory climate.”

With these facts in mind, how would a regulatory budget account for the unforeseen economic and environmental costs of deregulation?

*Answer: I agree that deregulation has costs. The best way to account for those costs is to encourage agencies to rescind or amend only those rules that impose costs on society that exceed their benefits to society and to discourage agencies from rescinding rules with social benefits that exceed their costs. President Obama’s Executive Orders 13563 and 13615 require Executive Branch agencies and OIRA to act in accordance with those principles.*



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## COMMITTEES:

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*Ron Wyden*Questions for the Record  
from Senator Wydenfor Professor Richard J. Pierce, JR., Lyle T. Alverson Professor of Law, George Washington  
University Law School  
Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget  
June 23, 2015  
Senate Budget Committee**Question 1:**

Professor Pierce, regulatory reform is an issue I have been working on for many years. Rather than requiring rules to meet a cost/benefit test, the regulatory reform legislation I worked up took a completely different track. It created two mechanisms to periodically reevaluate agency rules or the need for agency rules to make sure the system wasn't either overregulating or under regulating.

One mechanism is a look-back requirement for agencies to review existing rules to make sure they are still achieving their intended objective or should be modified or repealed. The other is a regulatory petition process so that industry can petition to have burdensome rules changed or repealed while advocates can petition to adopt new rules or strengthen rules to protect the public.

So instead of a one-sided approach to rulemaking that tilts against rulemaking unless it meets a cost/benefit test there would be a more level playing field that allows rules to be created or strengthened rather than just relaxed or repealed.

There's no denying that most regulations provide great benefits to society. According to the Office of Management and Budget (OMB), government agencies have achieved great success in establishing safeguards that protect American citizens and the environment against unnecessary risks. Just a few decades ago, we had to worry about rivers catching on fire, cars exploding on rear impact, workers breathing benzene and contracting cancer and even chemical haze settling over cities and towns. Luckily today, we have been able to get a lot of this under control – helping to save the environment and protecting millions of people from death and injury.

What I'm getting at Professor Pierce is that our country is better off because of the regulations that we have adopted over the last few decades.

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The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a 25-to-1 ratio. A study of rules issued by the EPA during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1. This is great news, but it doesn't mean that we're in the clear. There are still serious harms plaguing the health of our citizens and our environment, and new ones will continue to emerge as we develop new technologies and continue to innovate.

**Q:** Professor Pierce, can you explain the impact of a regulatory budget that ignores the *benefits* of a rule?

- What impact would this sort of policy have on regulations like those that have protected worker health and the environment?
- Recognizing that agencies like the EPA already do a good job of carrying out a cost benefit analysis for new rules, do you have any suggestions on how current regulatory budget proposals from the majority can be improved?

*Answer: I agree that it is important to have look back requirements and a procedure through which a regulated firm can petition the government to rescind or to amend a rule that imposes costs that exceed its benefits. Fortunately, we have both today in the context of Executive Branch agencies. Executive Orders 13563 and 13615 require Executive Branch agencies to identify and to rescind or amend existing rules that impose costs that exceed their benefits. Unfortunately, those Executive Orders do not require independent agencies to amend or rescind rules that impose costs that exceed their benefits. Section 553(e) of the Administrative Procedure Act requires each agency to provide anyone, including a regulated firm, the right to petition for the issuance, amendment, or repeal of a rule.*

United States Senate  
WASHINGTON, DC 20510

Mark R Warner

Questions for the Record  
from Senator Mark Warner  
for Susan Dudley and Richard Pierce  
Measuring the True Cost of Regulations: Exploring the Possibility of a Regulatory Budget  
June 23, 2015  
Senate Budget Committee

Question #1:

For thirty years presidents of both parties have required most federal agencies to analyze the costs and benefits of major new regulations and abide by the other principles designed to filter out excessive red tape, but independent agencies have been exempt. The Independent Agency Cost Benefit Analysis Act would include independent agencies in that process. Should independent agencies be required to participate in this same cost-benefit analysis process as executive agencies, and should there be more extensive or improved standards across the entire federal government?

*Answer: Independent agencies should be required to engage in the same types of careful cost-benefit-analysis as Executive Branch agencies when they issue major rules. Studies by academic researchers have found that independent agencies often do not engage in any form of cba and that, even when they do, the cbas are lower quality than those performed by Executive Branch agencies. I agree with the Supreme Court's opinions issued on June 29, 2015, in Michigan v. EPA. While the Justices disagreed on other issues, all nine Justices agreed that no agency should take a major regulatory action without considering the costs and benefits of the action.*